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In The

Supreme Court Of The United States

October Term, 1996

IN THE INTEREST OF: THE CHILDREN FOR WHOM SANDRA OVERCASH IS GUARDIAN AD LITEM

Petitioner

v.

MR. DOE AND MRS. DOE

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

PETITION FOR WRIT OF CERTIORARI (WITH ATTACHED APPENDICES)

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43 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Equal Protection and Due Process Clauses of the 14th Amendment Prohibit Appellate Courts From Remanding Protective Custody Cases on the Basis of "Staleness" Because Time Has Elapsed While the Cases Are on Appeal, Thereby Avoiding Meaningful Appellate Review?

II. Whether Minor Children in Protective Custody Cases Are Constitutionally Entitled to Meaningful Appellate Review of a Judicial Bias Claim Under the Equal Protection and Due Process Clauses of the 14th Amendment?

PARTIES TO THE PROCEEDINGS BELOW

1. Horry County Department of Social Services, Plaintiff in the Family Court;

2. Mr. Doe, Defendant-Respondent;

3. Mrs. Doe, Defendant-Respondent;

4. Sandra Overcash, In the Interests of the Children, Guardian ad Litem, Petitioner

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE PETITION . . . 13

I. Certiorari Should Be Granted to Decide Whether the Equal Protection and Due Process Clauses of the 14th Amendment Prohibit Appellate Courts From Remanding Protective Custody Cases on The Basis of Staleness Simply Because Time Has Elapsed While on Appeal 13

II. Certiorari Should Be Granted To Decide Whether Children in Protective Custody Cases Are Constitutionally Entitled to Meaningful Appellate Review of a Judicial Bias Claim Under the Equal Protection and Due Process Clauses of the 14th Amendment 21

CONCLUSION 30

APPENDIX

Order Granting the Petition for Writ of Certiorari filed October 7, 1996 In the South Carolina Supreme Court 1A

Memorandum Opinion No. 97-M-019 of The State of South Carolina Supreme Court filed March 24, 1997 . . . . . 2A-3A

Order of The Supreme Court of South Carolina denying Petition for Rehearing filed April 17, 1997 . . . . . 4A-5A

Unpublished Opinion of The State of South Carolina in The Court of Appeals O.p. No. 96-UP-022 filed January 23, 1996 . . . . . 6A-8A

Emergency Custody Order in the Family Court of the Fifteenth Judicial Circuit Filed November 23, 1992 . . . . . 9A-12A

Temporary Order (Not Ending Action) In the Family Court of the Fifteenth Judicial Circuit Filed August 4, 1993 . . . . . 13A-17A

Final Order (Ending Action) In The Family Court of the Fifteenth Judicial Circuit filed January 4, 1994 . . . . . 18A-24A

Order on Motion to Reconsider, Alter and Amend Decree filed March 1, 1994 . . . . . 25A-28A

Excerpts of Testimony of Sarah Shuh, M.D.
Qualified Expert in Pediatrics and Evaluation
of Child Sexual Abuse 29A-41A

TABLE OF AUTHORITIES

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Anderson v Bessermer City, 470 U.S. 564 (1985) 13, 16

Aetna Life Insurance Co. v Lavoie,
475 U.S. 813 (1986) 22

Bowman Transp. v Arkansas-Best Freight
System, 419 U.S. 281 (1974) 14, 16

Brown v Mississippi, 297 U.S. 278 (1936) 20

Cruzan v Director, MDH,
497 U.S. 261 (1990) 18

De Shaney vs Winnebago Cty.
Soc. Servs. Dept., 489 U.S. (1989) 24, 25

Estes v Texas, 381 U.S. 532 (1965) 22

Foucha v Louisiana, 504 U.S. 71 (1992) 18

Griffin v Illinois, 351 U.S. 12 (1956) 20

ICC v. Jersey City, 322 U.S. 503 (1944) 14, 16

Illinois v Allen, 397 U.S. 337 (1970) 14

In re Gault, 387 U.S. 1 (1967) 17, 21

In re Winship, 397 U.S. 358 (1970) 20

In re Oliver, 333 U.S. 257 (1948) 20

In re Murchison, 349 U.S. 133 (1955) 10, 22

Johnson v Mississippi, 403 U.S. 212 (1971) 10

Mathews v Eldridge, 424 U.S. 319 (1976) 14, 19

M.L.B. v S.L.J., U.S. , 5,
117 S. Ct. 555 (1997) 20

Nebraska Press Assn. v Stuart,
427 U.S. 539 (1976) 22

Palmore v Sidoti, 466 U.S. 429 (1984) 17, 18

Pennsylvania v Ritchie,
480 U.S. 39 (1987) 26

Reno v Flores, 507 U.S. 292 (1993) 18, 20
..... 21

Schall v Martin, 467 U.S. 253 (1984) 18

Shelley v Kraemer, 334 U.S. 1 (1948) 17

Santosky v Kramer, 455 U.S. 745 (1982) 11,16,
..... 18, 19

Trimble v Gordon, 430 U.S. 762 (1977) 18

Tumey v Ohio, 273 U.S. 510 (1927) 20

United States v Lanier, U.S. ,
65 U.S.L.W. 3814,
1997 U.S. Lexis 3658 (1997) 24

United Transportation Union v Michigan
Bar, 401 U.S. 576 (1971) 14

Ward v Village of Monroeville,
409 U.S. 57 (1972) 24

Weiss v United States, 510 U.S. 163 (1994) 22

Wilson v Wilson,
742 F.2d 1004 (6th Cir. 1984) 19

State Cases:

Cook v Cook, 311 S.E.2d 90
(S.C. Ct. App. 1984) 15

Doe v Hoult, 418 S.E. 2d 511
(N.C. 1992) 19

Dorn v Criddle, 410 S.E.2d 590
(S.C. Ct. App. 1991) 15

Edel v Edel, 293 N.W2d 792
(Mich. App. 1980) 16

Georgetown County Dept. of Social Services v Phipps,
292 S. E. 2d 184 (S.C. 1982) 15

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(Conn. App. 1994) 19

Holschuh v Holland-Moritz,
292 A.2d 380 (Pa.1972) 15

Hurst v Capitell, 539 So.2d 264
(Ala. 1989) 19

In re Kimberly, 609 N.E.2d 73 (Mass. 1993) 16

Madson v Madson, 313 N.W.2d 42
(S.D. 1981) 15

O'Shields v. O'Shields, 193 S.E.2d 523
(S.C. 1972) 15

Spartanburg County DSS v Powell,
S. C. Court of Appeals
Op. No. 90-MO-003 15

West Virginia Department of Human Services v La Rea Ann C. L., 332 S.E. 2d 632 (W. Va. 1985) 16

Constitutional Provisions:

U.S. Const. amend XIV ..... *in passim*

Miscellaneous:

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

IN THE INTERESTS OF THE CHILDREN: FOR WHOM SANDRA OVERCASH IS GUARDIAN AD LITEM,
Petitioner

vs

MR. DOE AND MRS. DOE, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF SOUTH CAROLINA SUPREME COURT

The Petitioner, Sandra Overcash, the Guardian ad Litem for the three minor children in interest, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of South Carolina in *Doe vs Doe*, case no. 92-DR-26-3244 (*see* Petitioner's Appendix at 2A-3A, hereinafter "App. ___").

OPINIONS BELOW

On March 24, 1997, after granting this Petitioner's petition for writ of certiorari (App. 1A) and entertaining oral argument, the Supreme Court for the State of South Carolina issued its unreported opinion dismissing the Petitioner's petition for writ of certiorari as improvidently granted. The opinion of the South Carolina Supreme Court is reproduced at App. 2A-3A. The South Carolina Supreme Court's denial of this Petitioner's petition for rehearing dated April 17, 1997 is reproduced at App. 4A.

The unpublished opinion of the Court of Appeals for the State of South Carolina affirming the appeal of the Petitioner in part, reversing in part, and remanding the case to the Family Court is reproduced at App. 6A-8A.

STATEMENT OF JURISDICTION

The South Carolina Supreme Court entered judgment of dismissal on March 24, 1997. On April 17, 1997, it denied this Petitioner's petition for rehearing. In accordance with Supreme Court Rule 13(3), the time for filing this petition for writ of certiorari runs from denial of the petition for rehearing, expiring July 16, 1997.

Petitioner invokes the certiorari jurisdiction of this Court pursuant to 28 U.S.C.§1257(a) and Supreme Court Rules 10 (b) and (c).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV: Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This petition filed by Sandra Overcash, as guardian ad litem for the children, concerns the welfare of all children in our society and the constitutional rights of children to due process and equal protection under the Fourteenth Amendment in the review of protective cases involving allegations of physical abuse, sexual abuse, neglect and mental injury.

The South Carolina Supreme Court, although initially agreeing to review this case, dismissed the minor children's petition for certiorari as improvidently granted. The South Carolina Supreme Court considered the record "stale" since three years had elapsed from the time of trial and while the case was on appeal. The South Carolina Supreme Court, implicitly rejected the petitioner's claims, both briefed and argued, that the Court of Appeals should have found bias by the Family Court, and that such judicial bias resulted in a violation of the children's constitutional rights to due process and equal protection under the Fourteenth Amendment.

This case was initiated in the Family Court on the complaint of the Horry County Department of Social Services ("DSS"), filed pursuant to Section 20-7-610 of the Code of Laws of South Carolina (1976). The Family Court of the Fifteenth Judicial Circuit entered an ex parte order on November 23, 1992 granting emergency protective custody, and temporary care and control of three minor children, James Herring, Savannah Herring and Teresa Herring to the DSS. At the time, the children were residing with their natural parents, the respondents Dan Herring and Laura Herring. This complaint was at least the third instance where the Herrings came to the attention of child protective services. R. 804-813.

The Family Court (Murdock, J.) found probable cause to believe that "by reason of abuse/neglect, there exists an imminent danger to the said child(ren)'s life or physical safety in the following particulars:

> On 11-19-92, DSS received information that James Herring stated he had been having oral sex with his father. James also

stated that his mother would put tape on his mouth while she did "funny" things to his dad. James was observed being made to kiss his two younger sisters, 4 and 3 years of age, in the mouth by his father. James was also made to kiss his father on the mouth and there was a licking that occurred between the two. DSS feels that the allegations made by 6 year old James requires the three minor children to be placed in the custody of the plaintiff for their protection from further abuse." App 10A.

The children were placed in foster care and their parents were granted two weekly supervised visitations. On motion of the Guardian ad Litem, the Family Court (Hearn, J.) determined that the parental visitations "may be impairing the Plaintiff's ability to emotionally stabilize the minor children" and curtailed the supervised visitations to every other week. App. 15A-16A.

A hearing on the merits was held on August 4, 5 and December 7, 1993 before Family Court Judge H.E. Bonnoitt, Jr. At the time of trial, the children's ages were as follows: James, age 6; Savannah, age 5; and Teresa, almost 4. All three children were qualified by the Court as competent to testify. Each of the children testified at trial to numerous incidents of physical and sexual abuse.

The eldest, James Herring, testified that his father "punches me in my private parts." James also identified a drawing made by him while institutionalized at the Medical University of South Carolina "of my daddy touching me in my private part", which was admitted into evidence. R. pp. 151-152. The young boy also described various incidents of physical abuse: that his father hit him in the face with a switch; kicked him; hit him with a tennis racket; sealed his mouth with duct tape and tied him to a chair with ropes. R. pp. 136, 137, 138, 140, 141, 149-150. On cross-examination, James testified that his father stuck a needle in his "private parts" on more than one occasion. R. p. 169.

Savannah Herring testified that her parents "were messing with the body parts" and indicated on an anatomically correct doll "down here," "sometimes I call it private place" or "tutu." She further indicated that both of her parents touched and rubbed her

"tutu"; her father "pee-peed in her mouth" and she afterwards spit a yellow substance "in the toilet." R. pp. 105; 109; 124. The Family Court, however, ignored Savannah's testimony that she had been rubbed and touched in her "tutu." App. 20A.

The youngest child, Teresa Herring, testified that they "pulled my pants down and then done it," later indicating that her father, with no clothes on and his underwear pulled down, took her pants off and "put his finger in there and then he touched me back here -[h]iney. He put his finger right there." R. p. 72. Teresa further testified that "mama started wanting to touch my tutti and daddy was sitting there watching mama." R. p. 68; 72.

Testimony corroborative of the children's physical abuse, sexual abuse, neglect, and mental injury was provided at trial by the children's foster parents, various caseworkers and therapists, the parents' evaluating psychologist[1], and by the children's Guardian ad Litem.

The children's testimony of physical and sexual abuse was further corroborated by the testimony of Sarah Elizabeth Shuh, M.D., a licensed medical doctor (since 1969), board certified in pediatrics. App. 31A. Dr. Shuh was qualified by the Family Court "as an expert in pediatrics and evaluation of sexually abused children" App. 32A. Her examination of both girls on January 15, 1993 yielded abnormal physical findings. App. 32A; 34A-36A. During her vaginal examination of Savannah Herrring, Dr. Shuh observed a "small notch representing an old scar in the interior

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1. Both parents were diagnosed with personality disorders by Kay McNeill, Ph.D., a licensed clinical psychologist. Dan Herring, age 34, unemployed and applying for a disability determination, was diagnosed with Dependent Personality Disorder with Avoidant and Passive Aggressive Features and Adjustment Disorder with Anxious Mood vs Specific Anxiety Disorder. Laura Herring, age 26 at the time of the evaluation, was diagnosed with Dependent-Compulsive Personality Disorder.

The Herrings had come to the attention of child protective services while in Texas and elsewhere in South Carolina prior to the instant action. R. 804-813.

portion of the hymen; a small scar external and posterior to the vaginal opening". App. 36A; 35A. During the rectal exam, Savannah indicated to Dr. Shuh she had "been hurt there before." App. 35A. Dr. Shuh noted a small triangular tag scar more external to the anal opening adjacent to a paler scar which extended into the anal canal which indicated trauma. *Id.* Dr. Shuh opined: that the hymenal scar was consistent with penetration of the hymenal opening into the vaginal canal; the scar "external to the vaginal opening but in the genitalia is compatible with an injury to the superficial tissues which could have been caused by sexual abuse"; and the scar in the anal canal was also compatible with penetration. Dr. Shuh testified on cross-examination that it was not "plausible" that Savannah's rectal scarring could be caused by the administering of Fleet enemas to relieve constipation. App. 39A. Dr. Shuh also testified that urinary tract infections "could not explain the hymenal scar." App. 39A-40A.

Dr. Shuh's examination of Teresa revealed a small posterior lateral scar in the anal canal which was "consistent with sexual abuse," corroborating both Teresa's testimony that her father had placed a finger in her "hiney," and her statement made to Dr. Shuh of object penetration. App. 36A-37A. Dr. Shuh also testified that many forms of sexual abuse leave no physical findings such as fondling, oral sex, vaginal finger penetration, and rectal penetration with the use of lubricants. App. 37A-38A.

At trial, the DSS presented testimony that at the time of the initial investigative worker's visit to the respondents' home, the two young girls were found to be very dirty, wearing inappropriate clothing for the season and without shoes. R. pp. 233; 814-815. There were no drawers for clothes in the children's rooms, no clothes in their closets, and the mattresses on the children's beds were soiled and had no sheets. R. pp. 231; 232.

At trial testimony was presented through the children's parents, foster parents and other witnesses of the severe behavioral problems exhibited by all three children. James Herrings behavioral problems were so severe that he was under the care of doctors at the Medical University in Charlestown at the time of his removal from the parental home. James was physically aggressive, urinating on

the carpet, in the closet, in the bathtub, defecating in the bathtub, smearing feces on his sisters and was physically aggressive with other children at school. R. pp. 375; 379; 380.

Savannah acted out sexually, masturbated repeatedly, and had a severe problem with wetting her pants and bed. R. pp. 271; 272; 276; 388; and 505. According to her aunt, she would wet her pants up to seven times a day. R. p. 615. She also began wetting the floor and defecating in the bathtub following parental visitations. R. pp. 388; 727; 728. Theresa Clardy, the children's therapeutic foster parent, testified that Savannah "would rub herself with her hands. She would take her panties off and she would put her hands on her private areas and rub herself." R. p. 248. Savannah's response to corrective action was "Mommy and Daddy do it and make me do it." R. p. 249.

Like Savannah, Teresa acted out sexually, rubbing herself in her vaginal area, pressing herself up against doorknobs and dresser drawers. R. p. 253. Teresa also experienced wetting problems related to visits with her parents. R. p. 254.

Under the care of a therapeutic foster parent, all three children expressed fear of being bathed and would cry such things as "are you going to hurt me," "what are you going to do," "are you going to hurt my ding dong." R. pp. 261; 263.

Janice Pepper, who was found by the court to be an expert in the fields of clinical psychology and counseling, and Amanda Hendrick, the DSS caseworker, both testified that such sexualized behavior, bedwetting, hyperactivity and aggressive play are all considered indicators of abuse. R. p. 318; 773.

The parents presented no expert testimony contradicting the physical and behavioral evidence supporting the DSS's complaint. Despite the physical and other evidence substantiating the DSS's complaint, the Family Court (Bonnoitt, J.) found insufficient evidence of physical or sexual abuse, dismissed the DSS complaint, and ordered the children returned to their natural parents. No factual findings were made by the Family Court on the allegations of neglect and mental injury.

The Family Court in its findings of fact remarked: "[t]his court must be cognizant of the inherent unreliability of *evidence presented of children* this age and of their susceptibility to acquiring matters from their environment and encoding such matters to their experience." App. 22A. Both the DSS and the Guardian Ad Litem filed Motions to Reconsider, Alter, and Amend the Family Court's decree. On March 1, 1994, the Family Court affirmed its earlier order, amended certain findings of fact, and included the following statement in its order: "[t]he most troubling question in this case involves the objectivity of many of those who involve themselves in the child sexual abuse industry." App. 28A. Although there was no expert testimony offered on the suggestibility of children or memory, the court nevertheless altered its earlier statement from the "evidence presented of children of this age", to "memory evidence presented by children." App. 26A.

The petitioner filed an appeal with the Court of Appeals for the State of South Carolina on March 11, 1994, contesting the Family Court's Final Order and the Order on Motions to Reconsider, Alter, and Amend Decree. The Petitioner expressly raised the federal constitutional issue of the children's right to a hearing before a neutral, unbiased judge under the due process and equal protection clauses of the 14th Amendment. This petitioner dedicated eight pages of its brief to the following issue: "the lower court's decisions should be reversed because the trial judge violated the children's constitutional rights to due process and equal protection."

The petitioner specifically challenged the Family Court's unreasonable classification of the testimony of children of three to six years of age on constitutional grounds. The equal protection arguments was expressly raised in the Court of Appeals: "[i]n creating an unreasonable classification based entirely upon age, he [Family Court Judge Bonnoitt] violated the children's right to equal protection under the law. U.S.C.A. Const. Amend. 14." (Petitioner's brief on the Court of Appeals, pp. 39-40).

The petitioner raised the due process issue in the Court of Appeals as follows:

> "in addition to his comments concerning the inherent unreliability of children and their memory evidence, the trial judge's scathing comment about the lack of 'objectivity of the sex abuse industry' demonstrates bias unsupported by the record. Such bias and closed-mindedness regarding sexual abuse of young children resulted in a denial of due process in that the children's cause was not heard by an impartial judge.... The United States Supreme Court has consistently held that litigants are entitled to a hearing before a fair and impartial judge. See, e.g., *Johnson vs Mississippi*, 403 U.S. 212, 217 (1971) [trial before an unbiased judge is essential to due process]; *In re Murchison*, 349 U.S. 133, 136 (1955) [a fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases . . .].The amended Findings of Fact clearly demonstrate that the Herring children were not afforded due process given the trial judge's clear prejudice against their testimony and the testimony of those who appeared on their behalf"(Petitioner's brief in Court of Appeals, pp. 41-42).

The Court of Appeals filed its unpublished opinion on January 23, 1996, affirming in part, reversing in part, and remanding the decision to the very same Family Court judge for further findings on the issues of neglect and mental injury (not physical and sexual abuse) and a de novo hearing. App. 8A. The Court of Appeals expressly acknowledged that, "the record reflects much evidence supporting physical and sexual abuse had the Family Court made such a finding", yet it found no abuse of discretion warranting reversal on the issues of physical and sexual abuse. App. 7A.

Although the Court of Appeals was "concerned about evidence at trial indicating the children had inadequate clothing, poor hygiene, and irregular medical care, as well as disturbing familiarity with sexual matters beyond their years", it nonetheless remanded the case to Family Court for further proceedings on the

issues of neglect and mental injury requiring a de novo hearing of the conditions of the home at the time of remand App. 8A. The Court of Appeals implicitly rejected the Petitioner's due process and equal protection arguments.

The Guardian ad Litem, following a denial of her Petition for Rehearing in the Court of Appeals, successfully petitioned for writ of certiorari to the South Carolina Supreme Court arguing: "the court of appeals should have found bias by the lower court which was clearly evidenced in the record, and which resulted in a violation of the minor children's constitutional rights to due process and equal protection." After briefing and entertaining oral argument, in a memorandum opinion filed March 24, 1997, the South Carolina Supreme Court dismissed[2] the Guardian ad Litem's petition as improvidently granted. The court stated in its opinion that "[w]hile we are concerned about the disturbing evidence presented at trial, the record is insufficient to allow us to make a finding of what is in the best interests of the children, especially since the trial transcript is over three (3) years old. We agree with the Court of Appeals that remand is required." The South Carolina Supreme Court ordered that the matter be disposed of in 90 days in view of the "staleness of the record and the considerable passage of time." App. 3A. The family court judge, to date, has conducted no such hearing. The 90 days is scheduled to expire July 16, 1997.

The Guardian ad Litem's petition for rehearing dated April 8, 1997, first raised and briefed the following federal issues:

> The Court erred in refusing to make a finding of what is in the best interests of the children on the premise that the trial transcript is over three years old, in that:
>
> a) A child's right to be free from harm is a protected liberty interest under the Fourteenth Amendment to the U.S. Constitution, and the state's duty to protect children from

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2 Notably this court granted certiorari to review a constitutional challenge following dismissal of the petitioners' appeal to the New York Court of Appeals in *Santosky v Kramer*, 455 U.S. 745, 752 (1982), cert. granted 450 U.S. 993 (1983).

such harm and grant custody based upon their best interests has been deemed a governmental interest for the purpose of the Equal Protection Clause, necessitating that this Court affirmatively address the issues of bias and impartiality prior to remanding this matter back to the trial judge for further determination.

b) All transcripts in appeals involving the custody and best interests of children could be considered "stale" to the extent that children's lives will necessarily change and be impacted by their placement as the appellate process progresses.

c) The issues on appeal in this case deal with the sufficiency of the evidence at the times of trial, plain error in the lower court's decision, and apparent bias and partiality on the part of the trial judge, all of which can be determined by a proper review of the trial transcript.

d) Although the Court of Appeals expressed concern about the minor children's "disturbing familiarity with sexual matters beyond their years," and found that the evidence at trial was sufficient to have supported findings of physical and sexual abuse had the trial court done so, its refusal to find abuse of discretion on the part of the trial judge amounted to a failure of the Court of Appeals to protect the best interests of the children.

e) Inasmuch as a remand of the case on the issues of neglect and mental injury do not address improper findings as to physical and sexual abuse, it is in the best interests of the minor children that this Court correct such findings in its own review of the record, especially in view of the fact that this court has expressed concern "about the disturbing evidence presented at trial," and felt compelled "to remind the trial judge and the parties that the best interest of the children is of paramount importance."

f) While "the best interests of the children" may or may not warrant immediate removal of the children from the

> home at this time, it is clearly in the best interests of the children that proper findings be made of any prior abuse which was substantially documented by evidence presented at the initial trial of this matter, and that immediate services be provided to the children and family.

The South Carolina Supreme Court denied this Petitioner's petition for rehearing on April 17, 1997, implicitly rejecting the aforementioned federal constitutional issues. App. 4A.

REASONS FOR GRANTING THE PETITION

I. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE 14TH AMENDMENT PROHIBIT APPELLATE COURTS FROM REMANDING PROTECTIVE CUSTODY CASES ON THE BASIS OF STALENESS SIMPLY BECAUSE TIME HAS ELAPSED WHILE THE CASES ARE ON APPEAL

The South Carolina Supreme Court refused to undertake any meaningful analysis of the record before it. Instead it dismissed the petitioner's petition for writ of certiorari after granting certiorari, briefing, and entertaining oral argument because three years had elapsed since the time of trial while the case was on appeal. App. 1-3A. In protective child custody cases where physical abuse, sexual abuse, neglect and mental injury are alleged, there is all the more need for meaningful appellate review of the record. A refusal to review creates the risk that children will be exposed to further harm and suffer the severe consequences of continued heinous abuse. Condoning remand without review on the record conflicts with decisions of this Court and sets a dangerous precedent.

This Court has made clear that controversies and factual issues are to be decided on the ***present record*** before the court. *Anderson v Bessermer City,* 470 U.S. 564, 577 (1985). This Court has on a number of occasions expressed unwillingness to remand cases for further proceedings due to the elapse of time:

> We appreciate the difficulties that arise when the lapse between hearing and ultimate decision is so long. Undoubtedly economic changes dated the 1966 studies that the parties, both applicants and appellees, had placed in the record. Nevertheless, we have always been loath to require that fact finding begin anew merely because of delay in proceedings of such magnitude and complexity. To repeat what was said in *ICC v. Jersey City*, 322 U.S. 503, 514-515 (1944): "Administrative consideration of evidence – particularly where the evidence is taken by an examiner, his report submitted to the parties, and a hearing held on their exceptions to it – always creates a gap between the time the record is closed and the time the administrative decision is promulgated. This is especially true if the issues are difficult, the evidence intricate, and the consideration of the case deliberate and careful. If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening." *Bowman Transp. v Arkansas-Best Freight System*, 419 U.S. 281, 294-295 (1974).

The majority of this Court in *Illinois v Allen*, 397 U.S. 337 (1970) had based its decision on review of a record that was thirteen years old! Noting that the majority was undeterred by the age of the case, Justice Douglas in his concurrence noted, "[t[his is a stale case, the trial having taken place nearly thirteen years ago." *Id.* at 351. A year later in *United Transportation Union v Michigan Bar*, 401 U.S. 576 (1971), the majority of this Court also rested its decision on a record the dissent characterized as "stale." *Id.* at 595.

The result should be no different in protective child custody cases. The parties are entitled to accurate and meaningful appellate review of their claims on the record before the court. A fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v Eldridge*, 424 U.S. 319, 333 (1976).

This case is not the first instance where the South Carolina Supreme Court and the Court of Appeals avoided appellate review based on "staleness" when the interests of children are at stake. See, *Georgetown County Dept. of Social Services v Phipps*, 292 S. E. 2d 184 (S.C. 1982). In *Georgetown County Dept. Of Social Services*, the DSS sought custody of two minor children. The trial court granted custody to the paternal grandparents, and on appeal, the South Carolina Supreme Court remanded for a trial de novo because "considerable time has elapsed since custody was granted and the record has become stale." *Id. at* 185. As in the instant case, three years elapsed from the time of trial and while the case was on appeal to the Court of Appeals and the Supreme Court.

The South Carolina Supreme Court in a parental custody case decided ten years before *Georgetown County DSS* correctly entertained the appeal on its merits and affirmed the lower court's ruling awarding custody to the child's mother, even though it considered the record "lamentably stale." *O'Shields v. O'Shields*, 193 S.E.2d 523 (S.C. 1972). The instant case and *Georgetown County Dept. of Social Services v Phipp* represent the more recent trend in protective custody cases followed by the South Carolina Supreme Court over the past 15 years. The frequency of this trend is hard to measure given that many appellate opinions involving protective custody cases, as in the instant case, are unpublished.

The Court of Appeals has also followed the lead of the state Supreme Court, remanding child custody cases on the basis of "staleness in both *Dorn v Criddle*, 410 S.E.2d 590, 592 (S.C. Ct. App. 1991) and *Cook v Cook*, 311 S.E.2d 90, 91 (S.C. Ct. App. 1984). In *Dorn v Criddle, supra at 592*, the Court of Appeals noted: [w]e, however, recognize that more than three years have elapsed since the trial court issued the appealed order partly because the original appeal was delayed for numerous reasons and partly because this Court granted a rehearing of a previously published decision in this case." In an unpublished decision in *Spartanburg County DSS v Powell*, Op. No. 90-MO-003 (Jan. 2, 1990), citing *Cook v Cook*, the Court of Appeals also remanded a protective custody case based on staleness instead of deciding the appeal.

The Supreme Court of South Dakota has also remanded child custody cases on the grounds that it considered the record stale. *Madson v Madson*, 313 N.W.2d 42, 44 (S.D. 1981), *citing Edel v Edel*, 293 N.W2d 792 (Mich. App. 1980). Similarly, the Supreme Court of Pennsylvania has also avoided meaningful appellate review of custody cases due to the lapse of time as the case "winds its way through the appellate process." See, *Holschuh v Holland-Moritz*, 292 A.2d 380, 385 (Pa. 1972). The Supreme Court of Appeals of West Virginia also remanded a child custody case because it believed "the appropriate procedure is to remand for development of a record on the existing state of facts, rather than making a decision on a 'stale' record." *West Virginia Department of Human Services v La Rea Ann C.L.*, 332 S.E. 2d 632, 636 (W. Va. 1985).

In direct conflict with the line of cases referenced above, the highest court of the state of Massachusetts, in *In re Kimberly*, 609 N.E. 2d 73, 75 (Mass. 1993), affirmed the termination of a mother's parental rights because of the sexual, physical and emotional abuse of her minor child; flatly rejecting the mother's claim that circumstances had changed and the evidence had become stale.

The practice of remanding child custody cases due to the passage of time should not be condoned and is in direct conflict with the holdings of this Court in *Anderson v Bessermer City*, 470 U.S. 564, 577 (1985); *Bowman Transp. v Arkansas-Best Freight System*, 419 U.S. 281, 294-295 (1974); and *ICC v. Jersey City*, 322 U.S. 503, 514-515 (1944).

Review of the propriety of remanding custody cases on the basis of staleness is an issue of paramount importance when the welfare of children is at stake. There is an enormous risk of returning children to abusive homes where they are endangered, leaving the issues of abuse on the record before the court unreviewable. Significantly, this Court granted certiorari on a record over three years old in a protective custody case to review the due process claims of the parents. *Santosky v Kramer*, 455 U.S. 745 (1982). The Petitioner respectfully requests this Court to grant certiorari to review the constitutional claims of children.

In custody cases where physical abuse, sexual abuse, neglect and mental injury are alleged, there is all the more need for meaningful review of the record by appellate courts. An application of the law to the facts as they existed at the time of trial is absolutely necessary so that a legal history on the family is accurately created. In 1995 alone, forty-five states reported that 996 children were known by child protective agencies ("CPS") to have died as a result of abuse or neglect. *U.S. Department of Health and Human Services, Child Maltreatment 1995: Report from the States of The National Child Abuse and Neglect Data System (Washington D.C.: U.S. Gov't Printing Office 1997).* Investigations by CPS agencies in 45 states determined that over one million children were victims of substantiated or indicated child abuse and neglect in 1995. Approximately 52% of the victims were female and 47% were male. *Id.*

Protective custody cases should not be singled out for disparate treatment by the appellate system. The South Carolina Supreme Court, and high courts in other states, have engaged in arbitrary and discriminatory classification of cases involving the interests of children. The South Carolina Supreme Court's decision to remand the case to the same biased Family Court judge because it considered the record "stale," is a state action governed by the Fourteenth Amendment, *Palmore v Sidoti*, 466 U.S. 429 (1984) citing *Shelley v Kraemer*, 334 U.S. 1 (1948).

While the word "child" is noticeably absent from the U.S. Constitution, the 14th Amendment due process and equal protection clauses expressly extend to "any person," regardless of age[3]. Since at least the landmark case of *In re Gault*, 387 U.S. 1 (1967), this Court has expressly recognized that the Constitution applies to children.

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3. By comparison with other nations, the United States is not a leader in protecting the rights of children. Some 80 other nations affirmatively protect children by name in their constitutions. In addition, 190 member nations have ratified the U.N. Convention on the Rights of Children. Only two member nations have not - Somalia and the United States. Gill, *Children's Interests, Trial, p. 10 (ATLA June 1997).*

This Court has also recognized the substantial governmental interest in granting custody based on the "best interests of the child" under the Fourteenth Amendment's equal protection clause. *Palmore, supra.* In *Palmore*, this court held "[t]he State of course has the highest order to protect the interests of minor children, particularly those of tender years." *Id.* at 433. "The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause." *Id.* This court has also held that illegitimate children cannot be denied equal protection of the law. *Trimble v Gordon*, 430 U.S. 762 (1977) (holding unconstitutional an intestacy statute that permitted children born out of wedlock to inherit only from their mother).

The government, in this instance the state of South Carolina, in the exercise of its parens patriae authority, has a governmental interest in "preserving and promoting the welfare of the child," *Santosky v Kramer*, 455 U.S. 745, 766 (1982). "Minimum standards must be met, and the child's fundamental rights must not be impaired". *Reno v Flores*, 507 U.S. 292 (1993). Justices O'Connor and Souter concurrence in *Reno* stated: "[s]pecifically, the absence of available parents, close relatives, or legal guardians to care for respondents (a class of alien juveniles) does not vitiate their constitutional interest in freedom from institutional confinement. It does not place that interest outside the core of the Due Process Clause." *Reno, supra* at 319 (concurring).

As a matter of substantive due process, children have a liberty interest in not being physically abused, sexually violated, or subjected to mental injury and neglect. This court has recognized the fundamental due process liberty interests of an individual to bodily integrity and personal autonomy. *Foucha v Louisiana*, 504 U.S. 71, 80 (1992). Freedom from bodily restraint by arbitrary government action has always been at the core of the liberty protected by the Due Process Clause. *Id.; also see, Cruzan v Director, MDH*, 497 U.S. 261, 278 (1990). In *Schall v Martin*, 467 U.S. 253 (1984), this Court made clear that children have a constitutionally protected liberty interest.

In recognizing the fundamental liberty interest of natural parents in the care, custody and management of their children, this court has also separately recognized the interests of children apart from their parents. *Santosky v Kramer*, 455 U.S. 745, 753 (1982). After the State has established parental unfitness at an initial fact finding proceeding in a termination of parental rights case, the court may assume at the dispositional stage that the interests of the child and the natural parents do diverge. *Id. at 760.* Until the State establishes parental unfitness, the child and parents share a vital interest in preventing erroneous termination of their natural relationship. *Id.*

Parents, children and the states share an interest in accurate and just decisions by courts of law in custody cases where abuse is suspected, regardless of whether the interests of parent and child are aligned or diverge[4]. With these rights having been previously recognized by this Court, certiorari should be granted in this case to decide whether the constitution mandates plenary appellate review of protective child custody cases on the record before appellate courts. The South Carolina Supreme Court's procedures for guaranteeing the fundamental rights of children are dangerously defective if cases can be remanded without meaningful appellate review simply because time elapses while cases are on appeal.

Applying the due process test set forth in *Mathews v Eldridge*, 424 U.S. 319, 335 (1976), as described in *Stantosky, supra* at 754, by balancing: 1) the private interests affected by the proceeding; 2) the risk of error created by the State's chosen procedure; and 3) the countervailing governmental interest supporting the challenged procedure -- yields the conclusion that all parties share an interest in an accurate and just decision. The risk of error has severe consequences with the potential of exposing

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4 In abrogating the doctrine of parental immunity in child sexual abuse cases, several courts have held, "[f]amilial discord or dysfunction obviously exists where parental sexual abuse occurs. Therefore, the purpose of the preservation of family harmony cannot justify immunity in the case of sexual abuse of a child by a parent". *Henderson v Woolley*, 644 A.2d 1303 (Conn. App. 1994); also see *Hurst v Capitell*, 539 So.2d 264 (Ala. 1989); *Doe v Hoult*, 418 S.E. 2d 511 (N.C. 1992); *Wilson v Wilson*, 742 F.2d 1004, 1005 (6th Cir. 1984).

children to further harm, as compared to the minimal administrative burden of undertaking plenary appellate review of the trial court record. When a party has been deprived of liberty (or property) without the safeguards of common-law procedure, this Court has not hesitated to grant certiorari and to find the proceedings violative of due process. *Tumey v Ohio*, 273 U.S. 510, 511 (1927); *Brown v Mississippi*, 297 U.S. 278 (1936); *In re Oliver*, 333 U.S. 257 (1948); and *In re Winship*, 397 U.S. 358, 361 (1970).

While it is true a state is not required by the Federal Constitution to provide appellate courts a right to appellate review, a state which does grant appellate review must do so in a manner which does not infringes upon an individual's constitutional rights. *M.L.B. v S.L.J.*, 117 S. Ct. 555 (1997) citing *Griffin v Illinois*, 351 U.S. 12, 18 (1956). In the instant case, the South Carolina Supreme Court granted certiorari and should have safeguarded the constitutional rights of the children by deciding the case on the record before it. States which provide appellate review as an integral part of their trial system must abide by the due process and equal protection clauses at all stages of the proceedings. *Id.* Once a state affords the right of appellate review it may not "bolt the door to equal justice." *M.L.B. v S.L.J., Id.* At a minimum, due process requires meaningful appellate review in protective child custody cases in order to protect children from the risk of further harm.

The decision of the South Carolina Supreme Court to remand the instant case because it considered the record stale is in direct conflict with the decisions of this Court as noted above. Nonetheless, the high courts in other states have also followed this dangerous pattern of remanding custody cases on the basis of staleness. The decision to remand because time has elapsed since trial - which happens in every appeal - shields parents in cases of suspected abuse from meaningful appellate scrutiny, leading to potential arbitrary results at the risk of exposing children to further abuse, neglect and mental injury.

The time is ripe to determine whether this procedure is tantamount to a constitutional violation of the equal protection and due process clauses as applied to children in protective custody cases. As Justices O'Connor and Souter remarked in *Reno v*

318 (concurring), "[t]o be sure, government's failure to take custody of a child whose family is unable to care for her may also effect harm. Rather, judicial review ensures that government acts in this sensitive area with the requisite care." *Reno, supra* 318. The South Carolina Supreme Court has demonstrated its failure to act with the requisite care. Departures "from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness." *In re Gault, supra* at 18-19.

A conflict exists between the Supreme Court of South Carolina and the high courts of other states, as well as the decisions of this court. Certiorari should be granted to decide this federal question of compelling public importance which impacts the right of children to meaningful appellate review of their claims in protective custody cases nationwide.

II. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER CHILDREN IN PROTECTIVE CUSTODY CASES ARE CONSTITUTIONALLY ENTITLED TO MEANINGFUL APPELLATE REVIEW OF A JUDICIAL BIAS CLAIM UNDER THE 14TH AMENDMENT

Family Court judge Bonnoitt, in addition to making numerous erroneous factual findings clearly refuted by the record, was biased against the children. This was most apparent when the Court expressed its unsubstantiated belief "in the inherent unreliability of evidence presented of children of this age". App. 22A. The Family Court judge, in an effort to cure his obvious error categorically discrediting all evidence presented by young children, later changed the remark regarding "the inherent unreliability of evidence presented of children of this age" to read: "[t]his Court must be cognizant of the memory evidence presented by children of this age and of such children's susceptibility to acquire matters from their environment and the authority figures therein and encoding such matters to their experience." App. 26A. This statement clearly unmasked the bias of the judge. No expert testified on behalf of the respondents regarding the "memory evidence of children" between the ages of three and six.

The Family Court, in an even more obvious display of bias in its Order on Motions to Reconsider, Alter, and Amend Decree, made the conclusory remark that "[t]he most troubling question in this case involves the objectivity of many of those who involve themselves in the child sexual abuse industry." While there certainly is a "child sexual abuse industry"comprised of those who profit from the sexual exploitation of children, the Family Court's derogatory remark was directed at those who advocate on their behalf. The remark was clearly unrelated to the task before the court and reflected personal bias derived from extrajudicial sources. The derogatory remark, coupled with the Family Court's findings directly contradicted by the record, and its disregard of physical evidence, all indicate a personal bias on the part of the judge.

The right to a fair trial is so basic to our jurisprudence that it has been called "the most fundamental of all freedoms." *Estes v Texas*, 381 U.S. 532 (1965). It is a right essential to the preservation and enjoyment of all other rights, providing a necessary means of safeguarding personal liberties against government oppression. *Nebraska Press Assn. v Stuart*, 427 U.S. 539, 586 (1976). A fair trial in a fair tribunal is a basic requirement of due process. *Weiss v United States*, 510 U.S. 163 (1994) *quoting*, *In re Murchison*, 349 U.S. 133, 136 (1955). An essential component to a fair trial is an impartial judge, *Weiss, supra*. The Due Process Clause "may sometimes bar trial judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice'," *Aetna Life Insurance Co. v Lavoie*, 475 U.S. 813, 825 (1986), *quoting In re Murchison*, *supra* at 136.

Due process requires a judge to be impartial in weighing the evidence in the courtroom. In the case of *In re Murchison*, the judge relied on his personal knowledge and impression of what had occurred outside the courtroom (ie. in the grand jury room); his judgment was based in part on this impression, the accuracy of which could not be tested by adequate cross-examination. In the instant case, the Family Court judge had a private bias against the testimony of young children, and evidence presented on their behalf, which he expressly and unequivocally made known in his amended

order. This so colored the Family Court's judgment that he conjured in his mind a fictitious, if not conspiratorial, "child sex abuse industry" comprised of child advocates and refused to follow the uncontradicted medical evidence of sexual abuse. As but one example, compare the following factual finding made by the Family Court with the evidence presented at trial:

The Family Court held:

> Both Teresa and Savannah were examined by Dr. Sara Shuh, a pediatrician. Dr. Shuh found no physical evidence that either girl had ever been penetrated with a needle or otherwise. Regarding Savannah, she did find certain scarring in the rectal area which, while they "were not inconsistent" with sexual abuse, could also be consistent with the child's history of constipation and urinary infections. App. 20A. Dr. Shuh found such scarring to be constipation problems the child had suffered. App. 27A.

On the contrary, Dr. Shuh had testified as follows:

> Q. And after examining those scars in this child, are those scars consistent with sexual abuse?
> A. They're consistent with --the hymenal scar is consistent with penetration of the hymenal opening into the vaginal canal, probably by an object which is not horribly -- not terribly large. I mean, it was a small scar and really healed as more of a notch than a deep scar, and the scar in the -- that was external to the vaginal opening but in the genitalia is compatible with penetration . . . App. 36A. The anal examination revealed two skin tags, one interiorly, one posteriorly, one posterior laterally . . . and a small posterior lateral scar which was visible in the anal canal. Its consistent with [sexual abuse]. App. 37A.

Regarding the urinary tract problems experienced by Savannah Herring, Dr. Shuh on cross-examination testified:

> I don't believe it [urinary tract infections] would explain the hymenal scar and I don't really think that because of the

nature of the scar that was in the posterior portion of the genitalia, it really didn't look like that. App. 39A-40A.

The Family Court Judge made erroneous findings regarding Savannah's rectal scarring. Further, it completely disregarded Dr. Shuh's testimony regarding the vaginal scarring and penetration even after the error was brought to his attention when the DSS and Guardian ad Litem moved for reconsideration. App. 36A. Moreover, the parents presented no expert testimony contradicting this compelling physical evidence.

A party is entitled to an adjudication of his or her rights before a neutral and detached judge in the first instance. *Ward v Village of Monroeville*, 409 U.S. 57 (1972). The petitioner raised and briefed the issue of bias in the South Carolina Court of Appeals. The issue first became clearly apparent when the Family Court issued its Order on Motions To Reconsider, Alter, and Amend Decree. Both the Court of Appeals and Supreme Court failed to expressly pass on the issue, implicitly rejecting the Petitioner's argument and remanding the case for further factual finding on the issues of mental injury and neglect to the very judge who had contradicted expert testimony, disregarded physical evidence of abuse, and against whom bias was alleged. By remanding this case to the very same judge, for all intent and purposes, the findings on neglect and mental injury has been predetermined. The South Carolina Supreme Court decision to remand solely on issues of neglect and mental injury is an inadequate remedy, making the need for review by this court all the more critical.

This Court has previously acknowledged that when a state takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. *DeShaney v Winnebago County, Dept. Of Social Services*, 489 U.S. 189, 199-200 (1989). *DeShaney* expressly recognized the constitutional duty of officials to protect against assault by private parties when the victim is in custody. *United States v Lanier*, U.S. , 12, fn.7, 65 U.S.L.W. 3814, 1997 U.S. Lexis 3658 (1997). In the instant case, a temporary order entered which awarded emergency

temporary custody to the DSS. Following the logic of *DeShaney*, the Family Court judge owed a constitutional duty to protect the children against assault by their parents and other private parties at the time of disposition of its final order. Instead, he allowed bias to infect the proceedings, made clearly erroneous factual findings contradicted by the record and, lacking the expertise to do so, concluded that the memory evidence of all young children is automatically suspect.

The notion that children are too suggestible to be credible is a symptom of the "Backlash" which has occurred against child protection in recent years. One authority notes, "[t]here is growing evidence of a backlash against child protection." J. Meyers, *The Backlash: Child Protection Under Fire* (Sage Publications 1994). Media reporting on child abuse is increasingly critical of the child protection system, giving rise to such catch phrases as "child abuse industry." *Id.* 86-89.

Critics of child abuse protection have organized and founded such groups as National American Man/Boy Love Association ("NAMBLA"), Victims of Child Abuse Laws ("VOCAL"), the False Memory Syndrome Foundation ("FMSF"), the National Justice Committee and a multitude of parental rights groups, with many spokespersons capturing the attention of the press. Confidentiality laws, however, restrict the ability of child advocates to freely speak on behalf of children to the press about specific cases. With this imbalance in place, and apparently conditioning uninformed judges, the need for appellate review is all the more critical where bias has been alleged.

Unsupportable theories and pseudoscience are now commonly cited as authoritative in the media. The research that is most frequently cited by the media on the testimony of children is that of Cornell University psychologist Stephen Ceci. Hayes, *Child's Word*, *ABC News Nightline*, November 14, 1996, Transcript #4039-1. The Ceci studies have been widely cited in the media as evidence for questioning children's accounts of sex abuse. *Id.* USA Today and the Boston Herald both cite to Ceci suggesting children can be induced to falsely claim abuse. *Id.* Ceci admits that these media accounts distort his findings: "not only do I believe

children can be reliable in sexual abuse cases, I believe the vast majority of them are reliable in those cases. Because in our studies we work at it very hard. I'm not talking about a single interview, where you sit down and you use a single leading question, and all of a sudden the child's giving you some highly elaborate narrative about something that never happened." *Id.*

It is exceedingly disturbing when family court judges embrace the rhetoric of the backlash by using such catch phrases as "child sex abuse industry" to describe medical doctors, psychologists, social workers, DSS caseworkers and child advocates. It is also disturbing when family court judges incorporate pseudo science propagated by media accounts into their decisions on critical issues dealing with the safety of children. Consequently, the South Carolina Supreme Court's failure to review the bias issue, instead remanding to the same judge, violates the children's right to a hearing before an impartial judge under the due process and equal protection clauses.

"Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim. A child's feelings of vulnerability and guilt and his or her unwillingness to come forward are particularly acute when the abuser is a parent." *Pennsylvania v Ritchie*, 480 U.S. 39, 60 (1987). The children in this case, even in the sterile and unfamiliar environment of the courtroom, did testify -- in their own words-- to specific instances of physical and sexual abuse on the part of their parents. Moreover, the testimony and medical evidence were corroborated by a medical doctor with expertise in the field of child sexual abuse evaluations. App. 34A-37A. Dr. Shuh's examination revealed vaginal and rectal scarring "consistent with sexual abuse". App. 36A; 37A. The testimony and physical findings were further corroborated by behavioral evidence observed of all three children indicative of sexual abuse.

This case is of compelling public importance. The children were entitled to a hearing before an impartial judge and, once certiorari was granted, plenary appellate review of their claim of bias. Child abuse in this country is far too prevalent to permit biased trial judges to adjudicate protective custody cases. In March

of 1996, the United States Department of Health and Human Services ("HHS") reported that in the year 1994, alone, 1,012,000 children in 48 states were victims of substantiated child abuse and neglect. *U.S. Dept. Of Health and Human Services, Child Maltreatment 1994: Reports from the States to the National Center on Child Abuse and Neglect* (Washington D.C.: U.S. Gov't Printing Office 1996). The HHS report found that 53 percent of maltreated children suffered neglect, 26 percent physical abuse, 14 percent sexual abuse, 5 percent emotional abuse, and 22 percent other forms of maltreatment.

In the fall of 1996, the HHS issued another report finding that the abuse and neglect of children in America nearly doubled between 1986 and 1993, indicating a dramatic increase in the severity of the problem in recent years despite the heightened social awareness. The HSS study estimated the number of children abused and neglected rose to 2.81 million in 1993 - up 98 percent from the figure of 1.42 million in 1986. More than 1,100 abused children died last year, an incomprehensible eighty percent of them at the hands of their own parents. *Child Maltreatment 1995: Reports from the States to the National Child Abuse and Neglect Data System*(Washington, D.C.: U.S. Gov't Printing Office 1997).

These statistics suggest that traditional means of redressing the problem through child protection agencies, the family courts and criminal justice system, have failed to curb even the rate of increase of child abuse. Allowing the high court's in our nation to delay and evade appellate review of bias claims by remanding for staleness in cases where evidence of child abuse is present only exacerbates a tragic social ailment and unnecessarily compounds the incidents of pain, damage and murder attributable to child abuse.

The social cost of child abuse is astounding, even staggering. Measured in monetary terms, the National Institute of Justice estimates the annual cost of child abuse to be $56 billion dollars. *Victim Costs and Consequences A New Look*, 1996. Bureau of Justice Statistics, U.S. Dept. of Justice NCJ-155282.

These statistics represent a frustrating and harsh reality when paired against the Family Court judge's prejudicial remark

about the "objectivity of the child sex abuse industry." Under the Constitution, the condition of being a young boy or young girl "does not justify a kangaroo court." *In re Gault*, *supra* at 28. Authorities who are more qualified than judges in regard to child behavior, question the conventional wisdom that children are less likely to be truthful on the witness stand than adults and that they are less capable of distinguishing the real from the imaginary. B. Marin et al., *The Potential of Children as Eyewitnesses: A Comparison of Children and Adults in Eyewitness Tasks*, 3 Law and Human Behavior 295, 304 (1979); G. Melton, *Children's Competency to Testify*, 5 Law and Hum. Behav., 75, 82 (1981); J. Landwirth, *Children as Witnesses in Child Sexual Abuse Trials*, 3 L. Guardian Rptr. (Issue IV 1987) p. 2; B. Nurcombe, *The Child as Witness: Competency and Credibility*, 25 J. Am. Acad. of Child Psychiatry 475, 479 (1986); Myers, *Evidence in Child Abuse and Neglect Cases*, Vol I, pp. 76-77, 232 (Wiley 1987).

Contrary to the Family Court's misguided belief in the inherent unreliability of memory evidence of young children, Nurcombe, *supra*, indicates: "if prompted, children as young as three years of age can recall past events quite well, although they will have difficulty under 10 years of age dating the events or attributing the appropriate motivation and intention to other people. Despite conventional wisdom, there is no evidence that children are more prone to lie than adults, and no evidence that they are more prone to confabulate or fabricate complex allegations."

Also in direct contradiction to the Family Court judge's prejudicial remark, Melton, *supra*, concludes that children's "memory appears to be no more of a problem than in adult eyewitnesses when recollection is stimulated with direct questions. Children are also no more prone to lying than adults".

Landwrith, *supra*, comments on child credibility as follows:

> A resurgence of activity in modern child psychology research suggest that there is little correlation between age and honesty and that children do not tend to fantasize about things outside of the realm of their normal life experiences. It has also been shown that children's short-term memory for

> facts about which they have understandable information may be as good as adults' and that children appear to be no more susceptible than adults about events for which their memory is equally strong. Similarly, the recanting of original statements by child victims, once taken as an expression of their propensity to fantasize, is now better understood as a manifestation of the complex family dynamics in child sexual abuse cases. J. Landwirth, *Children as Witnesses in Child Sexual Abuse Trials*, 3 L. Guardian Rptr. (IV 1987) p. 2.

Evidentiary expert and professor of law, John B. Meyers, summarizes the various studies regarding the suggestibility and credibility as follows:

> By age three, children recall salient events quite well. Children do not have a general memory deficit. Young children possess the memory skills to testify, especially when they are asked simple questions in a supportive atmosphere.
>
> Overall, psychological studies do not converge on a simple relation between age and suggestibility. It is clear, however, that children are not invariably more suggestible that adults. Suggestibility depends on cognitive, social, emotional, and situational factors, including the level of salience of the event. Myers, *Evidence in Child Abuse and Neglect Cases*, Vol I, pp. 76-77, 232 (Wiley 1987).

The Family Court's comments concerning the "inherent unreliability of evidence presented by children of this age" and "the memory evidence presented of children of this age," unreasonably classifies the testimony of children as automatically suspect. The Family Court Judge did so without any supporting expert testimony concerning memory evidence of children.

The Family Court judge's opinions lacked any thoughtful analysis of the wealth of scientific research related to memory, and specifically children's memories for traumatic events. The prejudicial remark regarding the "objectivity of the child sexual abuse industry" indicates an unwillingness on the part of the Family Court judge to undertake any serious consideration of these complex

issues. The South Carolina Supreme Court should have reviewed the bias issue instead of remanding the case to the same judge.

CONCLUSION

The petition for writ of certiorari to the South Carolina Supreme Court should be granted. Federal constitutional questions of compelling public importance concerning the rights of children in protective custody cases to meaningful appellate review under the equal protection and due process clauses are presented in this petition and warrant review on the merits by this court. A clear constitutional mandate for meaningful appellate scrutiny of child protective custody cases is needed in this nation.

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No. _____

In The
Supreme Court Of The United States
October Term, 1996

IN THE INTEREST OF:
THE CHILDREN FOR WHOM SANDRA OVERCASH,
GUARDIAN AD LITEM,

Petitioner

v.

MR. DOE AND MRS. DOE,

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF
SOUTH CAROLINA

APPENDICES

JULY, 1997

APPENDIX TABLE OF CONTENTS

Order Granting the Petition for Writ of Certiorari filed October 7, 1996 In the South Carolina Supreme Court 1A

Memorandum Opinion No. 97-M-019 of The State of South Carolina Supreme Court filed March 24, 1997 2A-3A

Order of The Supreme Court of South Carolina denying Petition for Rehearing filed April 17, 1997 4A-5A

Unpublished Opinion of The State of South Carolina In The Court of Appeals O.p. No. 96-UP-022 filed January 23, 1996 6A-8A

Emergency Custody Order In the Family Court of the Fifteenth Judicial Circuit Filed November 23, 1992 9A-12A

Temporary Order (Not Ending Action) In the Family Court of the Fifteenth Judicial Circuit Filed August 4, 1993 13A-17A

Final Order (Ending Action) In The Family Court of the Fifteenth Judicial Circuit filed January 4, 1994 18A-24A

Order on Motion to Reconsider, Alter And Amend Decree filed March 1, 1994 25A-28A

Excerpts of Testimony of Sarah Shuh, M.D.
Expert in Pediatrics and Child Sexual
Abuse Evaluations 39A-41A

THE SUPREME COURT OF SOUTH CAROLINA

Horry County Department
of Social Services, Respondent,

v.

Mr. Doe and Mrs. Doe, Respondents,

IN THE INTEREST OF:
The Children
For Whom Sandra Overcash,
Guardian Ad Litem is, Appellant.

O R D E R

We grant the petition for a writ of certiorari to review the Court of Appeals' decision in Horry County Dep't of Social Services v. Doe, Oop. No. 96-UP-022 (S.C. Ct. App. filed January 23,1996). The parties shall proceed to serve and file the appendix and briefs as provided by Rule 226(h), SCACR.

s/Ernest G. Fry, Jr. C.J.
s/James E. Moore A.J.
s/John H. Waller, Jr. A.J.
s/E.C. Burnett A.J.

Associate Justice Jean H. Toal,
not participating

Columbia, South Carolina
October 7, 1996

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Horry County Department
of Social Services, Respondent,

v.

Mr. Doe and Mrs. Doe, Respondents,

In the Interests of
the Children
for Whom Sandra Overcash,
Guardian Ad Litem is, Petitioner.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS

Appeal From Horry County
Hugh E. Bonnoitt, Jr., Family Court Judge

Memorandum Opinion No. 97-MO-019
Heard march 18, 1997 - Filed March 24, 1997

DISMISSED

Sylvia Lynn Gillotte, of Spartanburg, for Petitioner.
Thomas F. Moran, Dominic A. Starr and Robert Calamari, all of Nelson, Mullins, Riley & Scarborough, of Myrtle Beach, for Respondents Mr. Doe and Mrs. Doe.
Charles E. Parrish, of Conway, for Respondent Horry County DSS.

PER CURIAM: We granted certiorari to review the Court of Appeals' decision in Horry County Department of Social Services v. Doe, Op. No. 96-UP-022 (S.C. Ct. App. filed January 23, 1996). We dismiss certiorari as improvidently granted.

While we are concerned about the disturbing evidence presented at trial, the record is insufficient to allow us to make a finding of what is in the best interests of the children, especially since the trial transcript is over three (3) years old. We agree with the Court of Appeals that remand is required. Atkinson v. Atkinson, 279 S.C. 454, 309 S.E.2d 14 (Ct. App. 1983). We remind the trial judge and the parties that the best interest of the children is of paramount importance, and evidence and findings addressing that specific issue are required. In view of the staleness of the record and the considerable passage of time, we urge that this matter be disposed of within ninety (90) days from the date of this opinion.

s/Ernest G. Finney, Jr. C.J.

s/James E. Moore A.J.

s/John H. Waller, Jr. A.J.

s/E.C. Burnett A.J.

s/Jean H. Toal A.J.

THE SUPREME COURT OF SOUTH CAROLINA

Clyde N. Davis, Jr.
Clerk of Court
Brenda F. Shealy
Deputy Clerk

P.O. Box 11330
Columbia, S.C. 29211
(803) 734-1080

April 17, 1997

Sylvia Lynn Gillotte, Esquire
103 S. Pine Street, Suite 204
Spartanburg, South Carolina 29302

Re: Horry County DSS v. Mr. Doe and Mrs. Doe
Case No. 92-DR-26-3244

Dear Ms. Gillotte:

The Court has refused your Petition for Rehearing in the above case in the follow Order:

"Petition for Rehearing is denied.

s/Ernest G. Finney, Jr. C.J.

s/Jean H. Toal A.J.

s/James E. Moore A.J.

s/John H. Waller , Jr. A.J.

s/E.C. Burnett III A.J.

April 17, 1997."

The remittitur in this matter is being forwarded to the Clerk of Court for Horry County.

Very truly yours,

s/Clyde N. Davis, Jr.
CLERK

CND,Jr/sbm

cc: Charles E. Parrish, Esquire
Thomas F. Moran, Esquire
Dominic A. Starr, Esquire
Robert Calamari, Esquire

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Horry County Department
of Social Services,.....Respondent,

v.

Mr. Doe and Mrs. Doe,.....Respondents,

IN THE INTEREST OF:
The Children
For Whom Sandra Overcash,
Guardian Ad Litem is,.....Appellant.

Appeal from Horry County
H.E. Bonnoitt, Jr., Family Court Judge

Unpublished Opinion No. 96-UP-022
Heard January 9, 1996 - Filed January 23, 1996

AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED

PER CURIAM: The Horry County Department of Social Services (DSS) brought this action pursuant to S.C. Code Ann. §20-7-490 (1976) against Mr. Doe and Mrs. Doe seeking removal of their three minor children from their care and custody based on alleged physical and sexual abuse, neglect, and mental injury. On November 23, 1992, the family court issued an ex parte order directing removal of the children from the Does' custody and

placement of the children with the DSS. The basis for removal was an accusation of one of the children that he had been physically and sexually abused. After a merits hearing, the family court, on January 4, 1994, entered judgment in the Does' favor, expressly concluding there was insufficient evidence to warrant a finding of physical and sexual abuse as alleged by DSS and implicitly rejecting DSS's claims of neglect and mental injury. The family court, therefore, returned physical and legal custody of the children to the Does. Sandra Overcash, the children's guardian ad litem, appeals. DSS does not appeal. We affirm in part, reverse in part, and remand.

Although in appeals from family courts, an appellate court has jurisdiction to find the facts in accordance with its own view of the preponderance of the evidence, this broad scope of review neither requires us to disregard the findings of the family court nor relieves the appellant of the burden of convincing this court the family court committed error. Skinner v. King, 272 S.C. 520, 252 S.E.2d 891 (1979); Bramlett v. Davis, 289 S.C. 85, 344 S.E. 2d 867 (Ct. App. 1986).

The factors leading to the family court's findings that DSS provided insufficient proof of sexual and physical abuse dealt with the credibility of the testimony offered during the lengthy proceedings as well as the failure of DSS to present certain evidence, particularly corroborative physical evidence, to substantiate its allegations. See South Carolina Dep't of Social Servs. v. Forrester, 282 S.C. 582, 320 S.E.2d 39 (Ct. App. 1984) (Because an appellate court lacks the opportunity to observe the witnesses, it should give great deference to findings by the trial court where matters of credibility are concerned). Although the record reflects much evidence supporting physical and sexual abuse had the Family Court made such a finding, we find no abuse of discretion warranting our reversal of the family court's conclusion that the requisite evidence was lacking.

In finding a lack of sufficient evidence to support DSS's request for custody, however, the family court implicitly concluded DSS's allegations of neglect and mental injury were unfounded, but

did not make the specific findings of fact required to support dismissal of these allegations. See Rule 26, SCRFC ("An order or judgment pursuant to an adjudication in a domestic relations case shall set forth specific findings of fact and conclusions of law to support the court's decision.")' Atkinson v. Atkinson, 279 S.C. 454, 456, 309 S.E.2d 14, 15 (Ct. App. 1983) ("Proper appellate review is extremely difficult, if not impossible, where a lower court order omits specific findings of fact to support its legal conclusions."). The conflicting evidence presented at trial and the sensitive nature of this case cause us, as appellate judges, to hesitate to make our own fact findings on the issues of neglect and mental injury because of the importance of evaluating creditability, a responsibility best left to the family court.

Because we are concerned about evidence at trial indicating the children had inadequate clothing, poor hygiene, and irregular medical care, as well as a disturbing familiarity with sexual matters beyond their years, we remand the case to the family court for further proceedings on the issues of neglect and mental injury. In so doing, we recognize the children have been in the Does' custody during the two years this appeal has been pending and conditions in the Does' home may now be such that intervention by DSS would not be necessary. For that reason, we require the family court to conduct a de novo hearing based on the condition of the Does' home as of the time of the remand to determine if the children should remain in the environment or should be taken into protective custody again.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

SHAW, CURETON, and GOOLSBY, J.J., concur.

STATE OF SOUTH CAROLINA	)	IN THE FAMILY
	)	COURT
COUNTY OF HORRY	)	FIFTEENTH JUDICIAL
	)	CIRCUIT
	)	FILE NO.92-DR-26-
EX PARTE:	)	
	)	
HORRY COUNTY DEPARTMENT SOCIAL SERVICES,	)	
	)	
PLAINTIFF,	)	EMERGENCY
	)	CUSTODY
VS.	)	ORDER
	)	
DAN HERRING	)	
LAURA HERRING	)	
	)	
DEFENDANTS	)	
IN RE:	)	
JAMES HERRING	)	
DOB 11-13-86	)	
SAVANNAH HERRING	)	
DOB 5-26-88	)	
TERESA HERRING DOB 8-29-89	)	
MINOR CHILD(REN) UNDER	)	
THE AGE OF EIGHTEEN	)	
(18) YEARS	)	
_____	)	

This matter came before the Court on November 23, 1992, on a Complaint whereby Plaintiff requests that this Court, acting pursuant to that authority given it under Section 20-7-610 of the Code of Laws of South Carolina (1976), as amended, issue its Order Ex Parte, granting emergency protective custody, and temporary care and control of the minor child(ren), James Herring, Savannah

Herring, and Teresa Herring to Plaintiff, Horry County Department of Social Services.

The Complaint before the Court alleges that the minor child(ren), James Herring, Savannah Herring and Teresa Herring is/are presently residing at 600 Lesia Lane, Conway, S.C. in Horry County, South Carolina, with Dan & Laura Herring, (natural parents, guardian, or others exercising temporary or permanent control). It is further alleged in the Complaint that probable cause exists to believe that by reason of abuse/neglect, there exists an imminent danger to the said child(ren)'s life or physical safety in the following particulars:

> On 11-19-92, DSS received information that James Herring stated he had been having oral sex with his father. James also stated that his mother would put tape on his mouth while she did "funny" things to his dad. James was observed being made to kiss his two younger sisters, 4 and 3 years of age, in the mouth by his father. James was also made to kiss his father on the mouth and there was a licking that occurred between the two. DSS feels that the allegations made by 6 year old James requires the three minor children to be placed in custody of the plaintiff for their protection from further abuse.

Plaintiff has submitted a sworn affidavit in support of the allegations and the Court has studied the information contained therein. Said affidavit and its allegations are hereby incorporated by reference in this Order.

Plaintiff has further submitted in said affidavit that those persons presently exercising control and custody over said minor(s) have not provided consent to Plaintiff's being granted temporary custody in that:

The parents are not in agreement.

Based upon the foregoing, it is the finding of this court that there is imminent danger to the life or physical safety of the minor child(ren) James Herring, Savannah Herring and Teresa Herring by reason of the abuse/neglect noted more fully hereinabove, said children presently being in the care and control of the Defendant(s), Dan Herring and Laura Herring, and that said persons) have/have not consented to Plaintiff's being given temporary custody. It is further the finding of this Court that the Horry County Department of Social Services, as the local child protective Services agency, is a proper party to have temporary custody under such circumstances.

IT IS THEREFORE, ORDERED that emergency protective custody and the temporary care and control of the minor child(ren), James Herring, Savannah Herring and Teresa Herring be awarded to Horry County Department of Social Services, and that the Department shall exercise temporary control over placement, planning, and supervision of said child(ren). the Department shall further have authority to take whatever action necessary for the immediate welfare of the child(ren) with regard to medical and/or educational attention including the right to have said child(ren) examined by a licensed physician and if, within the judgement, examination, and diagnosis of said physician, to have said child(ren) hospitalized and treated in accordance with the directives of said physician. It is further,

ORDERED that the Horry County Department of Social Services shall not attempt to take the said minor child(ren) into custody unless accompanied by a duly authorized law enforcement officer and that it shall be the duty of the accompanying law enforcement officer to take the said minor child(ren) in to actual emergency protective custody. It is further,

ORDERED that if the Horry County Department of Social Services retains temporary custody, then the merits hearing shall be held on the _____ day of _____ at _____ before the Honorable _____ in Courtroom _____ unless continued by consent of all parties OR upon issuance of an Order of Continuance by the Family Court Judge.

Failure to comply with the terms of this Order or willful interference in its execution shall be subject to the full contempt powers of this Court, with possible penalty of a $1,000.00 fine or one year in jail or both.

AND IT IS SO ORDERED.

s/_____
J.H. MURDOCH JR.
JUDGE, FAMILY COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT

DATED: November 23, 1992
CONWAY, SOUTH CAROLINA

STATE OF SOUTH CAROLINA COUNTY OF HORRY	IN THE FAMILY COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
HORRY COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff, vs. DAN HERRING AND LAURA HERRING, Defendants, IN RE: JAMES HERRING, D.O.B. 11/13/86 SAVANNAH HERRING, D.O.B. 5/15/88 TERESA HERRING, D.O.B. 9/29/89 MINOR CHILDREN UNDER THE AGE OF EIGHTEEN (18) YEARS	DOCKET NO. 92-DR-26-3244 TEMPORARY ORDER (NOT ENDING ACTION) HORRY COUNTY 93 AUG 4 AM 9:49 BILLIE G. RICHARDSON CLERK OF THE COURT

DATE OF TRIAL: July 15, 1993
TRIAL JUDGE: Honorable Kaye G. Hearn
PLAINTIFF'S ATTORNEY: Thomas D. Guest, Jr.,Esq. Present
DEFENDANT'S ATTORNEY: Richard L. Foltz, Esq. Present
ATTORNEY FOR GUARDIAN AD LITEM: George W. Cox, Jr. - Present

GUARDIAN AD LITEM:	Sandra Overcash - Present
DEFENDANT:	Dan Herring - Present
DEFENDANT:	Laura Herring - Present
CASEWORKER:	Robin Peterson - Present

This matter comes before the Court pursuant to a Motion filed by the Attorney for the Guardian ad Litem requesting that this Court temporarily suspend the visitation privileges of the Defendants Dan Herring and Laura Herring for the reasons outlined in the Motion, which was filed on June 24, 1993. Present at this hearing were the parties as are more fully noted above.

This Court reviewed five (5) separate Affidavits tendered by the Movant in support of the Motion and two (2) Affidavits tendered by Defendants in opposition to the Motion. The Court also considered oral argument for the attorneys for the respective parties. Based upon the foregoing, the Court makes the following Findings of Fact and Conclusions of Law.:

FINDINGS OF FACT

Based upon the Affidavits before me, as well as the oral arguments presented during the Motion hearing, I make the following findings of salient fact:

1. I find that the Defendants are the natural parents of the minor children caption above. I find that the Plaintiff initially became involved in this home situation after receiving a Report indicating possible abuse and/or neglect as is set forth in the Complaint on file with this Court. I further find that a Ten-Day Hearing was held in this matter on December 3, 1992 resulting in a

Temporary Order of this Court dated December 29, 1992 finding, interalia, that temporary legal custody with the right of discretion for appropriate physical placement was to be awarded to the Plaintiff, and the Defendant natural parents were to be allowed two (2) weekly visits with the minor children under the Plaintiff's supervision.

2. I find that a hearing on the merits of this case was set for January 21, 1993, but that psychological and medical evaluations had not been completed at that time and, with the consent of all parties and their attorneys, the mater was continued by Order of this Court dated February 17, 1993.

3. Thereafter, I find that a subsequent hearing on the merits was scheduled for April 8, 1993, but at that time the Court was advised that a negotiated settlement was not possible, and the matter was carried over until the "next available term of Court" by Order dated May 10, 1993.

4. I now find that it is imperative that a contested merits hearing in this matter be set as soon as possible in order to resolve the allegations of possible abuse and neglect that have been pending before this Court since the Complaint for Custody was filed on November 23, 1992.

5. I find there is some merit to the Guardian ad Litem's position that the frequency of the Defendants' visitation rights may be impairing the Plaintiff's ability to emotionally stabilize the minor children, but I decline to temporarily suspend in toto the visitation rights of the Defendants.

6. I find that the present visitation privileges enjoyed by the Defendants via previous Order of this Court shall be amended effective the week beginning July 19, 1993 so as to provide for visits with the minor children once every two (2) weeks until the Merits Hearing is concluded.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of fact, I make the following Conclusions of Law;

a. I conclude as a matter of law that this Court has jurisdiction of the subject matter and of the parties in the case at bar.

b. I further conclude that this Order shall have no precedential value for purposes of a final hearing, although I conclude it is in the best interest of the minor children and all parties to this action that they and this Court endeavor to set this matter for trial as soon as possible.

c. I further conclude that this Court has the authority to modify the frequency of the visitation rights to which the Defendants are entitled if, in so doing, the consideration of the best interests of the minor children dictates such modification.

Based upon the foregoing, IT IS HEREBY ORDERED:

1. The Defendants' existing visitation rights shall be modified, effective immediately, to provide for supervised visitation with the minor children once every two (2) weeks until a hearing on the merits is concluded and a Final Order issued.

2. This matter shall be set for a Final Hearing as soon as it is practical.

3. The payment of fees to the attorney for the Guardian ad Litem for services rendered in the case at bar shall be held in abeyance until the Final Hearing.

AND SO IT IS ORDERED.

Conway, South Carolina

s/_____
KAYE G. HEARN, PRESIDING
JUDGE, FAMILY COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT

July 26, 1993

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	
	)	IN THE FAMILY
HORRY COUNTY DEPARTMENT OF SOCIAL SERVICES,	)	COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
Plaintiff,	)	DOCKET NO. 92-DR-26-3244
vs.	)	
	)	FINAL ORDER
DAN HERRING AND LAURA HERRING,	)	(ENDING ACTION)
Defendants,	)	HORRY COUNTY 94 JAN 4 AM 9:52
IN RE:	)	BILLIE G. RICHARDSON
JAMES HERRING, D.O.B. 11/13/86 SAVANNAH HERRING, D.O.B. 5/15/88 TERESA HERRING, D.O.B. 9/29/89 MINOR CHILDREN UNDER THE AGE OF EIGHTEEN (18) YEARS	)	CLERK OF THE COURT

DATES OF TRIAL:	August 4 & 5, and December 7, 1993
TRIAL JUDGE:	Honorable H.E. Bonnoitt, Jr.
PLAINTIFF'S ATTORNEY:	Thomas D. Guest, Jr.
DEFENDANT'S ATTORNEY:	Richard L. Foltz
ATTORNEY FOR GAL:	George W. Cox, Jr.
GUARDIAN AD LITEM:	Sandra Overcash
COURT REPORTER:	Wanda Hughes

THIS MATTER came before the Court pursuant to the Plaintiff's Complaint filed November 23, 1992 alleging various acts of physical and sexual abuse. The Defendant filed an Answer denying all allegations on December 23, 1992. Trial of the matter was held on the above stated dates with all parties present, together with the caseworker for the Plaintiff, Robin Peterson. Testimony was presented by all parties and their witnesses over three days of trial. Based upon the evidence presented to the Court, I make the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Defendants are the natural parents of the minor children.

2. The Plaintiff initially became involved in this case due to a report that at the time he was a patient at the Medical University of South Carolina, James Herring had stated that he had oral sex with his father. This allegation was not substantiated at trial by anyone from the Medical University. The Department of Social Services thereafter obtained an Order on November 23, 1992 to remove the minor girls from the Defendants' home and retain custody of all three children. The children have been in DSS custody since that time.

3. The thrust of the Plaintiff's case is based upon statements allegedly made by the children to caseworkers, therapists, and foster parents. All allegations seem to have started with observations of James by Brad Benjamin, a therapeutic assistant at MUSC, and what were interpreted as inappropriate sexual activities by James.

4. According to Amanda Hendricks, of the Department of Social Services, the allegations made by the girls were first made approximately a week or ten days after they were taken into custody and examined by therapists hired by the Plaintiff.

5. The accusations against the Defendants can be best summarized by separating them by child:

(a) James was alleged to have accused his father of performing oral sex in statements made to therapists at the Medical University of South Carolina in Charleston, S.C. Several witnesses from the Medical University were presented by the Plaintiff to corroborate that these statements were made by James at MUSC, but no such corroboration occurred. However, while on the witness stand, James, the oldest of the children, denied that this occurred or that the other sexually related allegations as they relate to him occurred. Regarding the sexual allegations, the only thing he could relate was that on one occasion he was led (or "pulled") down the hallway, with his clothes on, by his crotch area. I find this could have reasonably been a parent pulling a child by his trousers, being misinterpreted by a six-year-old child. James alleged at trial that he had "needles" stuck in his private parts on eight (8) different occasions. James' testimony was so contradictory it is hard to know what to believe. At trial he demonstrated the same language, behavior, and lack of veracity for which he has been treated on a number of occasions, both before and after emergency protective custody was taken.

(b). There was evidence presented that one or both the Defendants may have inserted "needles" into the vaginal area of one of the girls. Both Teresa and Savannah were examined by Dr. Sara E. Schuh, a pediatrician. Dr. Schuh found no physical evidence that either girl had ever been penetrated with a needle or otherwise. Regarding Savannah, she did find certain scarring in the rectal area which, while they "were not inconsistent" with sexual abuse, could also be consistent with the child's history of constipation and urinary infections. At trial, Savannah denied ever being stuck with a needle or stick pin. Teresa did not testify that she was stuck with a needle. There was no evidence presented to show physical evidence of insertion of "needles" into Jame's private parts.

(c) Allegations have been made that the Defendant Dan Herring ejaculated into Savannah's mouth; however, in her testimony, Savannah was inconsistent with the statements made to her therapists. Her testimony at trial was that her Daddy "pee-peed" in her mouth on four different days or occasions, and at least once when her mother, brother, sister, and two uncles were present. These allegations were the only abuse indicated by Savannah in her trial testimony. This testimony came only after Plaintiff's attorney told her in an indirect manner that she wasn't being truthful. She may also have been influenced by her foster mother who told her she would never see her again unless she told "the truth".

(d) Dan Herring has been accused of physically abusing his son James by punching him in the nose. The evidence presented, however, including that of James himself, is that the "injury" occurred during rough-housing and was at worst an accident.

(e) The Plaintiff complains of locks on the children's doors, on the outside, inferring that the children are locked in their rooms as a form on punishment. Even the children denied being locked in their room. The Plaintiff's rebuttal witness, Marsha Crossland, testified that, while she disagreed with the concept of locks on the doors, the Defendants had earlier told her that the locks were needed to keep the children out of their rooms.

(f) The testimony of Teresa, the youngest child, augmented by use of anatomically correct dolls, was so obviously rehearsed it is impossible to tell if it was actually what she independently recalled. She repeated the same litany over in exact detail.

(g) All of the children were counseled by the same person, Janice Pepper, over an extensive period. On August 5, 1993, Ms. Pepper had counseled James 20 times, Savannah 15 times, and Teresa 12 times. None of the sessions were taped or otherwise recorded, the reasons for which she was unable to explain. The anatomically correct dolls used by all three children at trial were provided by her. The children's familiarity with the dolls and

Teresa's obviously rehearsed testimony raises serious questions as to whether or not the comments made by the children either prior to Court or at the time of trial were their own recollections.

6. The Defendants deny all allegations raised against them. While recognizing the difficulty of disproving charges once made, I find the following as credible evidence on behalf of the Defendants:

(a) At the time of removal, the children were only aged 6, 4, and 3, respectively. This Court must be cognizant of the inherent unreliability of evidence presented of children this age and of their susceptibility to acquiring matters from their environment and encoding such matters to their experience.

(b) The minor child James had problems throughout his life, for which his parents repeatedly sought medical help, which problems continue to this date as evidenced by testimony of the foster parents and witnesses of the Department of Social Services.

(c) It was the parents, because of James' medical difficulties, who referred him to the Medical University of South Carolina for help. This Court must recognize that this act would be inconsistent with Plaintiff's accusations.

(d) From the time the first child was born, the Defendants either lived with other family members or had members of the family living with them the vast majority of the time up until the time the children were removed. When considered with the ages of the children, the only time the alleged abuse could have occurred would be after the Defendants returned from Texas in August, 1991, at which time James would have been age 5, and the younger children ages 3 and 2, respectively. During this time, the Defendants lived with Dan Herring's parents for approximately one month, then had one or both of Laura Herring's brothers living with them up to the time of removal.

(e) Defendants presented witnesses from their family and from their church who testified from their personal experience that they never saw evidence of abuse as presented by the Plaintiff. The Defendants spent on average three days a week at their church, with the children present, and many of these witnesses regularly visited their home.

(f) Robin Peterson indicated that the Defendants exercised their supervised visitation with the children on many occasions when she was the supervising agent. The children never appeared fearful and happily played with their father. No inappropriate contact or conversations were observed. The Defendants have completed all of the treatment plan recommended by DSS.

7. Evaluating the time frame in which the abuse must have occurred, I find it to be unlikely that of which the Defendants stand accused could have occurred without being observed by others who had regular contact with the Defendants.

8. Many of the Plaintiff's witnesses indicated in their testimony their dislike for Mr. Herring based on the way he conducted himself in dealing with them or while in their presence. While these opinions might influence one to feel Mr. Herring would be a poor parental figure, it is not a basis for removal of children from parental custody.

9. The initial referral of the child James was made by the Defendants after many years of trying to find medical help for their child. I note that there is no evidence that the referring pediatrician found any evidence of abuse, in fact the referral was made because of the child's parents' concern.

10. I further find that the problems experienced by the Defendants with the children have continued despite removal for over a year, indicating that they were already acting in behalf of the children before the allegations arose.

11. Based on the foregoing, I find there is insufficient evidence to find that physical or sexual abuse as alleged by the Plaintiff has occurred.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of fact, I make the following Conclusions of Law:

a. This Court has jurisdiction of the subject matter and the parties in the case at bar. Section 20-7-420 and 736, South Carolina Code of Laws, 1976.

b. The Plaintiff has failed to prove by a preponderance of the evidence that the alleged abuse occurred. Therefore, it is hereby

ORDERED, that the Plaintiff's Complaint be dismissed and that both physical and legal custody of the minor children be restored to the Defendants immediately.

AND IT IS SO ORDERED.

s/_____
H. E. Bonnoitt, Jr., Presiding
Judge of the Family Court for
the Fifteenth Judicial Circuit

January 3, 1994

Georgetown, South Carolina.

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE FAMILY
HORRY COUNTY OF SOCIAL SERVICES	)	COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
Plaintiff,	)	DOCKET NO. 92-DR-26-3244
vs.	)	
DAN HERRING AND LAURA HERRING,	)	ORDER ON MOTIONS TO RECONSIDER, ALTER, AND AMEND DECREE
Defendants,	)	
IN RE:	)	
JAMES HERRING, D.O.B. 11/13/86 SAVANNAH HERRING, D.O.B. 5/15/88 TERESA HERRING, D.O.B. 9/29/89 MINOR CHILDREN UNDER THE AGE OF EIGHTEEN (18) YEARS	)	

DATE OF HEARING: February 16, 1994
JUDGE: Honorable H.E. Bonnoitt, Jr.
PLAINTIFF'S ATTORNEY: John L. Sherrill, Esquire
DEFENDANT'S ATTORNEY: Richard L. Foltz

ATTORNEY FOR GAL: George W. Cox, Jr., and Ellen Snowber-Marini

COURT REPORTER: Debbie M. Wright

THIS MATTER came before the Court pursuant to Motions by both the Plaintiff and the Guardian ad Litem for the minor children, pursuant to Rule 59 and 60, South Carolina Rules of Civil Procedure, asking the Court to reconsider, alter, and amend the Final Order of January 3, 1994. After listening to the arguments presented by the attorneys for both parties and the Guardian ad Litem, I make the following findings and conclusions:

1. In Paragraph 5(e) of the Findings of Fact of the Final Order the finding, as stated, was that the Defendants had earlier told Marsha Crosland, a witness for the Plaintiff on reply, that the locks on the children's bedroom door was needed to keep the children out of their rooms. This finding was misstated and is corrected to find as follows: "Marsha Crosland testified that she disagreed with the concept of locks on doors and that the Defendant, James Herring, had told her, some two years before, that he had placed a lock on the bedroom door in order to lock James, the hyperactive child, in the room so as to protect the other children".

2. In paragraph 6(a) of the Findings of Fact of the Final Order, the finding states that the Court "must be cognizant of the inherent unreliability of evidence presented of children this age. . . ". This finding was misstated and is corrected to a finding as follows: "This Court must be cognizant of the memory evidence presented by children of this age and of such children's susceptibility to acquire matters from their environment and the authority figures therein and encoding such matters to their experience".

3. In paragraph 6(f) of the Findings of Fact of the Final Order, the findings state that the Defendants have completed all of the treatment plan recommended by D.S.S. This finding was incomplete and is hereby revised to state as follows: "The Defendants have completed all of the treatment plan recommended by D.S.S., except for the counseling which would be based on an admission by them of perpetrating abuse on their children, which they refused to do".

The remaining requests for alteration and amendments to the Final Order of January 3, 1994, are found to be without foundation or against the greater weight of the evidence. The Plaintiff and the Guardian ad Litem appear to wish the Court to make findings of abuse based on supposition and the validation of various symptoms they assume to be consistent with child abuse. In reality, the Defendants in this case took a child with severe behavioral problems to the Medical University of South Carolina for treatment after years of failure with numerous other treatment sources. The child's problems, which were exhibited at the Medical University, were interpreted to be possibly grounded in sexual abuse. The reaction by the Horry County Department of Social Services is evident by it's petition allegation that the child had stated that he had been having oral sex with his father. That the child ever made such a statement was never substantiated in Court. There was never any physical proof corroborating the statements later alleged to have been made by the children and, in fact, the physical examinations directly contradicted such allegations. In these Motions before the Court, the Plaintiff and Guardian ad Litem ask the Court to make a finding of possible sexual abuse based on an observation by Dr. Sarah Schuh of scarring in the area of the oldest girl's rectum. Dr. Schuh found such scarring to be consistent with the constipation problems the child had suffered. In addition, there was no testimony by that child or anyone she may have told, or who may have observed, that she was sexually abused in that area of her body.

The attorneys for the Guardian ad Litem also argue that the Guardian's report of statements to her by the children should be given greater weight, however, she testified at trial that she interviewed the children only two times. At the first interview, on January 8, 1994, the children made no statements alleging any sexual abuse. All such reported allegations were made at the second interview on May 11, 1994. This was after the children had been in therapy for an extended period.

The most troubling question in this case involves the objectivity of many of those who involve themselves in the child sexual abuse industry.

AND IT IS SO ORDERED.

s/_____
H. E. Bonnoitt, Jr., Presiding
Judge of the Family Court for
the Fifteenth Judicial Circuit

Georgetown, South Carolina

March 1, 1994.

STATE OF SOUTH CAROLINA	) IN THE FAMILY
	) COURT OF THE
COUNTY OF HORRY	) FIFTEENTH
	) JUDICIAL CIRCUIT
	)
HORRY COUNTY	) CASE NO. 92-DR-
DEPARTMENT OF	) 26-3244
SOCIAL SERVICES,	)
	)
PLAINTIFF	) TRANSCRIPT OF
	) TESTIMONY
VS.	)
DAN HERRING AND	)
LAURA HERRING,	)
DEFENDANTS.	)
	)

CONWAY, SOUTH CAROLINA

AUGUST 4, 1993
AUGUST 5, 1993
DECEMBER 7, 1993

B E F O R E :

HONORABLE H. E. BONNOITT, JR., JUDGE

A P P E A R A N C E S :

THOMAS D. GUEST, JR. ESQUIRE
Attorney for Department of Social Services

RICHARD L. FOLTZ, ESQUIRE

Attorney for the Defendants.

GEORGE W. COX, JR., ESQUIRE
Attorney for the Guardian ad Litem.

MS. SANDRA OVERCASH
Guardian ad Litem

WANDA H. HUGHES
Court Reporter

TESTIMONY OF SARAH SCHUH M.D. - DIRECT BY MR. GUEST

MR. GUEST: Your honor, at this time the State would call Dr. Sarah Schuh.

DR. SARAH SCHUH, BEING DULY SWORN, TESTIFIED AS FOLLOWS:

THE COURT: Have a seat right here and state your full name for the record.
A. Sarah Elizabeth Schuh, S-c-h-u-h.

DIRECT EXAMINATION BY MR. GUEST:
Q. Dr. Schuh, if you would, please, tell the Court where you're employed.
A. I'm employed at the Department of Pediatrics at the Medical University of South Carolina in the Children's Hospital.
Q. And where do you presently reside?
A. In Mt. Pleasant, South Carolina.
Q. How long have you been at the Medical University?
A. Since 1969.
Q. Okay, and where were you before that?
A. Before that, I was employed by St. Luke's Hospital as a physician and prior to that, received a degree in public health at Columbia University. I had worked for two years in Fulton County

and Dekalb County with the Department of Health. I received my medical school training at Columbia University in New York at the College of Physicians and Surgeons, and after graduation did a residency in pediatrics at St. Luke's Hospital Center in New York.
Q. Have you undergone any other training after you graduated from medical school?
A. I completed residency in pediatrics and I'm Board certified in pediatrics and have a degree in public health.
Q. Do you have any professional licenses or anything---
A. I was licensed originally in New York State, subsequently in Georgia, and have been licensed in South Carolina since 1969.
Q. And do you do any lecturing or consulting of any type in your position?
A. In my position, I'm responsible for programs involving both the teaching and evaluation of sexually or physically abused children within the Medical University, primarily, those admitted to the Department of Pediatrics, but I also consult with and teach for the other departments within the University as requested. That would include all of the colleges of the University, including the College of Nursing, Allied Health, and the College of Pharmacy, as well as consulting for the departments of obstetrics and gynecology, family medicine, and occasionally for other departments, dermatology, orthopedics, or whatever.
Q. And have you testified before?
A. Yes, I have.
Q. And during those times, you were found to be an expert in what field?
A. In pediatrics, and very often, also in the evaluation of sexually abused children.
Q. Your Honor, I would move at this time to have Dr. Schuh found to be an expert in that area.

MR. FOLTZ: No objection.

THE COURT: Do you stipulate to her qualifications?

MR. FOLTZ: Yes, Sir.

THE COURT: Mr. Cox?

MR. COX: Stipulation also, Your Honor.

THE COURT: All right, based on the stipulations, it's gonna be the finding of the Court that she is qualified as an expert in pediatrics and evaluation of sexually abused children.

DIRECT EXAMINATION RESUMED BY MR. GUEST.

Q. Dr. Schuh, could you please tell the Court -- well, first of all, which children have you examined?

A. I've examined Savannah and Teresa Herring.

Q. Okay, and what was the date of that visit?

A. January 15, 1993.

Q. And is that the only time you've ---

A. Yes, it is.

Q. And what was the reason for them coming to your office.

A. They were referred for an evaluation because of an allegation of physical abuse and possible sexual abuse.

Q. And if you would, what is your usual practice when you perform that type of an evaluation.

A. As with any medical case, the first step would be to take a history which may include questioning the adults that accompany the children, questioning the children themselves, and reviewing any written materials provided by those individuals relevant to the child's -- the allegations that are being investigated or evaluated.

Q. And did you take a history on that?

A. Yes, I did.

Q. And what was the source of that history?

A. I received part of the history from Robin Peterson of the Department of Social Services, some from a review of the -- a portion of the medical record of James Herring, the children's brother, and of course, some from talking to the children.

Q. Now, when you're taking a history in the course of the medical evaluation for the physical or sexual abuse,
what specific information are you looking for?

A. In a case where the allegation involves possible physical or sexual abuse, I would be looking for anything which would indicate to me any particular or special procedures that might be needed such as x-rays or blood tests, as well as indications which suggest where

any injury may have occurred on the child, so I would pay particular attention to that area in doing the physical examination.

Q. And in this case, was there any pertinent history which effected examination of these children?

A. Yes, there was an allegation that the children had been physically abused and that---

MR. FOLTZ: Excuse me, Your Honor. Before we get too far into this line of questioning as far as the evidence, it might be appropriate to find out if the Solicitor intends to take this information off of one of the reports or statements that I do have of Dr. Schuh, or is he getting some hearsay evidence that may have come from another source or other statements.

THE COURT: Well, Mr. Foltz, if she says anything that the children told her that are not contained in the information that was provided to you, then you need to make your objection over it.

MR. FOLTZ: All right, Sir.

THE COURT: I mean, I don't know what your objection is right now, I assume it's to some form of hearsay, but you haven't specifically stated that.

MR. FOLTZ: Well, Your Honor, certainly that's what made me rise because the Doctor began to talk about receiving reports from somebody, and so I certainly object to any testimony as far as what these reports do say, regardless of where they are from, and then we have to get to this issue with the children. If she's gonna be saying that it came from the children---

THE COURT: Well, I think the first time she indicates in any of her testimony that it's any kind of hearsay, then you need to object until there's a foundation laid, and then if you got a basis for an objection, I'll be happy to hear from you.

MR. FOLTZ: All right. Well, at this time, I am objecting to the beginning of this answer that is talking about receiving information from a report that the doctor is about ready to testify about.

THE COURT: All right. How about it Solicitor?

MR. GUEST: Your Honor, again, we discussed this earlier. I think the Doctor, as an expert, has to be able to lay the foundation as to what she bases her expert opinion on, and she has to base that

upon information she got from when the children were brought in so she can know what to look for and where she's going.

THE COURT: Okay, I think she stated that. She said she got her history from the children, some medical records on James, -- and the history she got was statements by the two girls, medical records on James, and some conversations with Robin Peterson.

MR. GUEST: Okay, did it go further than that, Your Honor? May I---

THE COURT: Well, you want her to reach some kind of conclusion, don't you?

MR. GUEST: Well, Yes, Sir.

THE COURT: She's telling you partially what the basis is, and she's had a – did a physical exam or whatever else she did as far as that's concerned, that's fine.

MR. GUEST: You've lost me, Your Honor. I apologize.

THE COURT: No, I'm not trying to lose you.

MR. GUEST: I mean, are we to proceed at this point.

THE COURT: Yes, sir, you've got to proceed.

DIRECT EXAMINATION RESUMED BY MR. GUEST:

Q. Dr. Schuh, in going back to going over the history with the children and the people that brought the children in, from what you learned from that, did that guide you to look at any specific areas to what you were looking for?

A. The reports that were given to me by Ms. Peterson and the review of the medical record indicated that the children had been hit and punched in the mouth or face – or excuse me, in the stomach or the genital---

MR. FOLTZ: Your Honor, this is the objection that I was trying to reach that she's now testifying about what was in the reports---

THE COURT: I'm going to sustain the objection.

DIRECT EXAMINATION RESUMED BY MR. GUEST:

Q. Okay, after receiving the information from Ms. Peterson and the other information that you got, what did that lead you to do, from that information, Dr. Schuh?

A. I performed an examination on each of the girls.

Q. Okay, and what type of examination was that?

A. I did a physical examination on each of the girls, starting first with Savannah. Savannah had given no particular history regarding any kind of painful or inappropriate contact until I was in the process of doing the examination. She did not have any evidence of injury to the face, chest or abdomen. She did -- was cooperative in the examination and in evaluating the genital examination, she did have normal external female genitalia which was pre-pubertal. The vaginal opening was generous but not enlarged for her age. The hymen was normal with the exception of a small notch representing an old scar in the interior portion, and there was also a small scar external the vaginal opening -- external and posterior to the vaginal opening. The rectal examination was of note in that the original rectal examination is done with the patient lying flat and her legs in kind of a frog-leg position, and then the secondary examination is done with the patient turned over face down with her buttocks in the air on her knees, which is called the knee-chest position. That's done in order that the buttocks can be more easily spread and the anus more easily -- or the external portion of the rectal opening more easily visualized. When I turned her over, she asked me if I was going to hurt her, and I asked her if she had been hurt there before or why was she asking the question. She did indicate that she had been hurt there before, but she did not name any person as being the person or indicate one. She said that she had been bitten by a dog at some point, although I didn't see anything that looked like there were any -- there were no tooth -- anything that looked like tooth scars from a dog. The physical examination of the enterectal examination did reveal a small, triangular tag scar which extended into the margin of the anal mucoso with the skin and also was adjacent to a paler scar which extended into the anal canal. There were no other anal or genital abnormalities in that -- that indicated any type of trauma other than those, and there were some small scars on the extremities, but those are not unusual in children, and did not particularly -- were not of particular note. We did laboratory testing on Savannah, although we did not test for gonorrhea because there was a history that the patient had vaginitis and had -- and was actually receiving antibiotics at the time we saw her. She had been evaluated, as I understand it, by another physician for vaginal

discharge, and I did not see a copy of that record. She reportedly did have a history of having inserted some tissue, that is a kleenex type tissue or toilet tissue, into the vaginal vulva area, and it was my understanding that they felt that the---

MR. FOLTZ: Objection, Your Honor. I believe she's getting into some information that she could only get from a source that would be hearsay at this point.

THE COURT: How about it, Mr. Solicitor? I think he's right. I'm gonna sustain it. It would take the conclusion by another person to---

DIRECT EXAMINATION RESUMED BY MR. GUEST:

Q. Now, Dr. Schuh, now this was on Savannah. Let me go back just one second. How many scars did you find on her?
A. She had a small scar in the hymen -- in the interior portion of the hymen. She had a scar in the genitalia posterior to the vaginal opening, and she had two scars which looked like they ran into each other and could have been sustained at the same time or separate times, one more externally on the anal opening and one extending into the anal canal.
Q. And after examining those scars in this child, are those scars consistent with sexual abuse?
A. They're consistent with -- the hymenal scar is consistent with penetration of the hymenal opening into the vaginal canal, probably by an object which is not horribly -- not terribly large. I mean, it was a small scar and really healed as more of a notch than a deep scar, and the scar in the -- that was external to the vaginal opening but in the genitalia is compatible with penetration, but scars in the anal canal can be seen sometimes from constipation which causes superficial tearing of the rectum.
Q. In your -- on Teresa, when you examined Teresa, what did you find with her?
A. The examination of Teresa was done also on the same day, and she also gave minimal information when I was first talking to her prior to the examination, but during the examination when I was -- had turned over and was looking at her anus, I was getting ready to

put in a cotton swab and she asked me if I was going to put a needle in, and I explained to her it wasn't a needle, but I asked her why she was asking that or if anyone else had put in a needle and she said, "Yes, it was black". I asked her who put the needle in, and she did name an individual. The physical examination revealed no evidence of any injuries to the face, the trunk or the abdomen, and the genitalia were normal, pre-pubertal female genitalia. There was no evidence of injury-- there was no evidence of injury to the vaginal opening and there was no evidence of injury to the hymenal tissues. The anal examination revealed two anul skin tags, one interiorly, one posteriorly, one posterior laterally and you can have congenital skin tags in the anul area, but they're usually not -- they're usually in the mid-line. They're usually not lateral, and they can be a result of injury to the anus or rectum. She did also have a small posterior lateral scar which was visible in the anal canal when she was in the knee-chest position and the anus open, somewhat relaxed, and you could see into the anal canal.

Q. And this scarring, could that also be consistent with sexual abuse.

A. It's consistent with it.

Q. Dr. Schuh, how many -- do you have any idea how many exams on little girls you've done?

A. On little girls?

Q. Yes, ma'am?

A. All together?

Q. Well, just an estimate.

A. Probably ten or fifteen thousand, I would think.

Q. Okay. If -- would it be unusual for a little girl to say that someone stuck a finger in her and it not cause any damage?

A. No, it would not be unusual at all. Now, I haven't done that many sexual abuse evaluations, but over the years, I probably have done a thousand or more exams for sexual abuse. It is well recognized and available in any text that introduction into the rectum, if done in a reasonably gentle manner, and particularly if there's any kind of lubrication or use of vaseline or lotion or anything, commonly leaves nothing at all visible. There may be

some redness immediately afterwards, but there is commonly no scarring of any kind. And nothing can be seen at a later date.

Q. And would it necessarily prove is disprove that there had been sexual abuse if the hymen was still intact?

A. No, not at all. Many forms of sexual abuse leave no physical findings. In fact, the majority of sexual abuse -- in the majority of cases where there is sexual abuse -- substantiated sexual abuse -- where there is substantiated sexual abuse and where there is sexual abuse acknowledged by the perpetrator, there are no physical findings because the sexual abuse may have involved only fondling. It may have involved oral sex which rarely leaves anything unless there's a sexually transmitted disease. It may have involved the use of lubricants. The vaginal opening may be sufficiently stretchy, I guess is the word you would say, to allow a finger to be introduced without damaging the hymen at all, so that it's not at all uncommon to have no physical finding -- no abnormal physical findings after sexual abuse has occurred and been substantiated.

Q. Is it common for girls that have been sexually abused to insert things into their vaginal areas?

A. I certainly wouldn't say it's common, but it does happen. It's not extremely rare.

Q. Would it be common for a child to inflict or to insert anything into their anal cavity?

A. I think that's seen less often, probably for a variety of reasons, including the fact that it's just harder to get at.

Q. Please answer any questions by—

THE COURT: Cross examination, Mr. Foltz?

CROSS EXAMINATION BY MR. FOLTZ:

Q. Thank you. Dr. Schuh, I'm Dick Foltz and I represent the Herrings on this. If I get your testimony, taking the last couple of questions, the absence of some of the physical evidence doesn't necessarily preclude sexual abuse by your testimony, so I guess the other way around it doesn't preclude that nothing happened at all either, right? I mean, it doesn't really draw any conclusions, is what I'm saying, by itself?

A. If there are no physical findings, there may have been sexual abuse or there may not have been sexual abuse.

Q. And if I'm following your testimony correct, there could even be – for example, one of your physical findings dealt with the scars in the anus, in the rectum. There could be some ordinary explanations that would preclude or have nothing to do with sexual abuse that would also be consistent with those findings? Is that correct?

A. I think that scarring leading to redundant tissue as tags is less common as a result of constipation of physiologic, if you will, injuries than those that are just thin, fine-line scars, but it certainly is not beyond the realm of possibility.

Q. Well, the main reason I'm asking is because I think that you even raised with Savannah the issue about the constipation. If you learned today that Savannah had a history of constipation as a young child—

MR. GUEST: I'm gonna object to that question, Your Honor.

THE COURT: Why?

MR. GUEST: That's not into evidence, and I don't think he can use that as a hypothetical to tell anything about constipation that's come into evidence.

THE COURT: I'm going to overrule the objection. I'm going to allow him to ask the question. All right, Sir, go ahead.

CROSS EXAMINATION RESUMED BY MR. FOLTZ:

Q. If you learned today that Savannah had a history of constipation as a young child, and in fact, even had to go the hospital on at least one occasion where she was administered numerous Fleet enemas in order to help clear her up, would that be a plausible explanation for her scars?

A. I would say possible rather than plausible.

Q. All right. Is it a possible explanation for some of the vaginal scars and the other scars that Savannah has, that if you learned today that because of a history where she had some urinary tract problems – to this day she even still wets a lot and she has a lot of infections in the urinary tract and complained of itching and burning from the urinary tract, her scratching herself in that area, would that be an explanation for these types of scars.

A. I don't believe it would explain the hymenal scar and I don't really think that because of the nature of the scar that was in the

posterior portion of the genitalia, it really didn't look like that. That's all I can say.

Q. Thank you. That's all I have, Your Honor.

THE COURT: Mr. Cox?

CROSS EXAMINATION BY MR. COX?

Q. Dr. Schuh, good afternoon. the hour is late, but I'd like to ask you a couple of questions. What was the length of your visit with them on the 15th of January of this year? How long did you---

A. Probably all together it was probably - I don't have an exact time, but close to two hours I would think.

Q. During that time, did you notice any inappropriate -- and by inappropriate, I mean for their age which is fairly tender years, self touching, fondling, masturbation, or anything like that?

A. During my exam, no.

Q. Yes, while you were with them, of your personal knowledge.

A. No.

Q. I think you were telling about an abasive procedure that one of the children mentioned with the needle, and she mentioned an individual. Who was that individual?

A. She mentioned her father. She said daddy.

Q. Daddy. Thank you.

THE COURT: Anything else?

MR. GUEST: No, sir, that's all I have.

THE COURT: Dr. Schuh, was there any evidence of any kind of needle injury to this child?

A. No, sir, but it was a little confusing to me because she said -- normally -- first of all, she is old enough to know colors. That was one of the questions. Normally, the needle that you would -- that I would think of in speaking to a child would be a needle that you might find at a doctor's office which would -- is one kind of needle kids tend to be familiar with, where the other one would be a sewing needle, and neither one of those would have been black, and the child told me it was black, so I'm not sure -- I could not get her to answer further questions. For example, one of the questions that I would like to have had her answer would have been, "Did you know it was a needle because you saw the needle, or did somebody tell you it was a needle, or because it felt like a needle," so there were some

questions -- because it was behind her and she said it was a needle, I had a lot of questions. Presumably, she saw it because she said it was black, but I'm not sure that -- I had a lot of -- I think there are a lot of unanswered questions about that particular remark, and she was not willing to respond to me any further, and it certainly needed to be explored, but I couldn't do it there.

THE COURT: You never examined James?

A. I don't believe so. I did review James' record.

THE COURT: Was there anything in the record that you reviewed at that time that indicated that he had informed anyone that he had had a needle inserted into his penis on eight separate occasions?

A. I'm sure I would remember that, and I certainly don't recall it. I did not go through the entire record. I had a summary of the record.

THE COURT: Did either one of the girls, when you took a history from them, did they relate to you -- either one of 'em relate to you at that time of any oral sex?

A. No, Sir. They talked very little to me, and I did not push them to talk to me because I knew they were seeing a therapist.

THE COURT: And neither one of 'em said anything about anyone urinating in their mouth or anything like that?

A. No, but I didn't ask.

Q. All right. Any other questions, Solicitor, now that I've asked the doctor a few questions? I'll give each one of you a chance to ask her anything else.

MR. GUEST: No, sir, Your Honor.

THE COURT: Mr. Foltz?

MR. FOLTZ: No. Sir.

MR. COX: Nor I.

THE COURT: Thank you, Doctor. Appreciate you being here. Do you want to excuse her, Solicitor?